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United States
Circuit Court of Appeals

V.L
2361

For the Ninth Circuit.

E. J. JONES,

Appellant,

vs.

JIM BRUSH, State Treasurer of the State of Arizona, SIDNEY P. OSBORN, Governor of the State of Arizona, DAN E. GARVEY, Secretary of State of the State of Arizona, MARICOPA COUNTY, JOHN A. FOOTE, ED OGLESBY and PHIL ISLEY, constituting the Board of Supervisors of Maricopa County, Arizona,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United
States for the District of Arizona

FILED

OCT 22 1913

PAUL P. O'BRIEN,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

E. J. JONES,

Appellant,

vs.

JIM BRUSH, State Treasurer of the State of Arizona, SIDNEY P. OSBORN, Governor of the State of Arizona, DAN E. GARVEY, Secretary of State of the State of Arizona, MARICOPA COUNTY, JOHN A. FOOTE, ED OGLESBY and PHIL ISLEY, constituting the Board of Supervisors of Maricopa County, Arizona,

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**Upon Appeal from the District Court of the United
States for the District of Arizona**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
for the District of Arizona

No. CIV-385 Phx.

E. J. JONES,

Plaintiff,

vs.

JIM BRUSH, State Treasurer of the State of Arizona, SIDNEY P. OSBORN, Governor of the State of Arizona, DAN E. GARVEY, Secretary of State of the State of Arizona, MARICOPA COUNTY, JOHN A. FOOTE, ED OGLESBY and PHIL ISLEY, constituting the Board of Supervisors of Maricopa County, Arizona,

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT DECLARING THAT CERTAIN HIGHWAY BONDS OF MARICOPA COUNTY HELD IN THE STATE SCHOOL FUND ARE NOT SUBJECT TO CALL BEFORE THEIR DUE DATE

Comes now E. J. Jones, the plaintiff, and for cause of action against the defendants alleges, as follows:

I.

That plaintiff now is and for many years has been a citizen and a resident and taxpayer of the State of Arizona and, as such citizen, resident and tax-

payer, has the right to enforce the trusts created by Sections 24, 25, 26, 27 and 28 of the Enabling Act of the State of Arizona.

II.

That the defendant, Jim Brush, is the State Treasurer of the State of Arizona and as such State Treasurer is the trustee or custodian of the funds and securities derived by said State from donations by the United States to said State in trust, under the provisions of the Enabling Act providing for the admission of Arizona as a state, and is charged with the duty of investing the funds of said trusts; that the defendants, Sidney P. Osborn and Dan E. Garvey, are Governor and Secretary of State, respectively, of the State of Arizona and, as such [4] Governor and Secretary of the State, are charged with the duty of approving of securities in which the State Treasurer invests monies of said trusts; that defendant, Maricopa County, is a county of the State of Arizona; that John A. Foote, Ed Oglesby and Phil Isley constitute the Board of Supervisors of said Maricopa County; that all of the individual defendants herein named are sued in their official capacity above set forth.

III.

That jurisdiction of the United States District Court for the District of Arizona is invoked in this suit upon the ground that this is a case arising under the Constitution and laws of the United States and particularly under the Act of Congress ap-

proved June 20, 1910, commonly known as the Enabling Act of the States of New Mexico and Arizona.

IV.

That defendant, Jim Brush, by virtue of his office as the State Treasurer of the State of Arizona, is the trustee or custodian of a total of Fifty-six Thousand (\$56,000.00) Dollars par value of the two issues of Maricopa County Highway bonds hereinafter described; that Thirty-one Thousand (\$31,000.00) Dollars of said bonds are of the issue of 1919, bearing $5\frac{1}{2}\%$ interest per annum, and, according to their terms, become due and payable on the fifteenth day of June during the years 1945 to 1949, inclusive; that Twenty-five Thousand (\$25,000.00) Dollars par value of said bonds are of the issue of 1921, bearing Six (6%) per cent interest per annum and, according to their terms, become due and payable on the fifteenth day of January during the years 1944 to 1951, both inclusive; that all of the aforesaid bonds are owned by the State of Arizona and are held in that portion of the trust created by Sections 24 to 28, both inclusive, of the Enabling Act of the State of Arizona, known [5] as the Permanent School Fund; that all of the aforesaid bonds are due and payable on definite dates within the limits above mentioned; that the difference between the value of the above mentioned bonds if defendant, Maricopa County, is legally bound to pay the agreed rate of interest thereon until the respective due dates therein specified as

is contended by the plaintiff and the value of said bonds if they are presently subject to call for redemption by said Maricopa County as is contended by said Maricopa County greatly exceeds the sum of Three Thousand (\$3,000.00) Dollars.

V.

That at all times when any bonds herein mentioned were voted, authorized, advertised for sale, sold, issued, paid for and delivered, the counties of the State of Arizona, of which defendant, Maricopa County, is one, were authorized and empowered to issue negotiable bonds under the terms and provisions of Chapter II, Title 52, Sections 5266 to 5285, Revised Statutes of Arizona for 1913; that said Chapter II, Title 52, among other things provided that if the proposed indebtedness to be created by said bonds would cause said county to become indebted in excess of four (4%) per cent of the value of taxable property in such county to be ascertained by the last assessment for State and County purposes previous to such proposed incurring of such indebtedness, said proposed bond issue should be submitted to the property taxpayers of the county, and said Chapter II, Title 52, contained the following specific provisions:

(1) In Section 5273, that in the call for election there shall be "set forth the aggregate amount of said bonds, the term thereof, the rate of interest to be paid thereon, when such interest shall be paid, the date of maturity of

said [6] bonds, or other evidences of indebtedness and the purposes for which the money derived from the sale of such bonds or other evidence of indebtedness shall be expended”.

(2) In Section 5274 that said bonds “shall be signed and attested * * * by the Chairman and Clerk of the Board of Supervisors”, and further, that “said bonds shall be payable at a date not to exceed forty (40) years from the date of their issuance.”

(3) In Section 5275, that “said bonds shall be payable to bearer and coupons for the interest shall be attached to each of the said bonds.”

(4) In Section 5275, “that none of said bonds or other evidences of indebtedness shall be sold for a less amount than par with accrued interest.”

(5) In Section 5278, “and until all of said bonds or other evidences of indebtedness of such county are redeemed the board of supervisors of such county where such indebtedness is created under the provisions of this chapter * * * is authorized, and it shall be its duty, to levy and cause to be collected a tax in addition to the amount of taxes which now or hereafter may be authorized by law for state and county purposes at the same time and in the same manner as other taxes are levied and collected by such county * * * upon all taxable property in such county * * * sufficient to pay the

interest on all bonds issued when such interest shall become due, and said tax when collected shall constitute a fund for the payment of interest on said bonds or other evidences of indebtedness and shall be called 'Interest Fund' ''.

(6) In Section 5279, "The Board of Supervisors of any county where any indebtedness shall be created under the provisions of this chapter * * * shall also, and in addition [7] to the taxes for state and county purposes, * * * and the tax hereinabove provided to be levied for the payment of interest on such bonds or other evidences of indebtedness, levy a tax for the purpose of redeeming said bonds or other evidence of indebtedness when the same shall mature as specified in the order and call for election hereinbefore in this chapter provided to be made, and all money derived from the levy of the tax in this section provided for when collected shall constitute a fund and shall be called the 'Redemption Fund' and shall be used for the redemption of said bonds or other evidences of indebtedness according to the number of their issue. The tax in this section provided to be levied shall be levied annually so as to provide a fund for the redemption of such bonds or other evidences of indebtedness when the same shall mature."

(7) In Section 5281, "When any bonds or other evidences of indebtedness created under

the provisions of this chapter shall mature it shall be the duty of the county treasurer * * * to give notice for four weeks in some newspaper published in the county in which such bonds or other evidences of indebtedness shall have been issued, of the intention of such county * * * to redeem such bonds, stating the amount thereof, and such redemption shall be made by the county * * * and all said bonds or evidences of indebtedness shall cease to draw interest at the expiration of four weeks after the date of said notice, and if said bonds so noticed for redemption shall not be presented for redemption within three months from the date of such notice said county treasurer * * * shall apply said money to the redemption of the bonds next in the order of the number of their issue."

(8) In Section 5281, "The Board of Supervisors * * * issuing bonds or other evidences of indebtedness under pro- [8] visions of this chapter shall, by resolution entered upon its minutes prior to the offering for sale of said bonds or other evidences of indebtedness, and within a period of fifteen (15) days from the canvassing of the vote of the election herein provided for, prepare a form of bond which shall substantially conform to the description of said bonds mentioned in the order required by this chapter published and recorded."

VI.

That there was no provision whatsoever in said Chapter II, Title 52, Arizona Revised Statutes of 1913, nor any statute, law, custom or practice of the State of Arizona at the date of the issuance of the bonds hereinabove mentioned, authorizing or contemplating the calling of said bonds before their maturity dates, and that the only provision of the statutes, laws, customs or practice of the State of Arizona and the counties and other legal subdivisions thereof at the time of the issuance of the above mentioned bonds were the express provisions of the statute above set forth authorizing a redemption of said bonds after the maturity dates thereof.

VII.

That in the year 1917 there was passed and became a law of the State of Arizona, Chapter 31 of Arizona Session Laws of 1917, which provides for the creation of county highway commissions and expressly authorizes the issuance of bonds for the construction and improvement of highways of the county. Said section provides that bonds might be issued and sold as other county bonds. That said Chapter 31 above mentioned was amended on March 17th, 1919, by Chapter 63 of the Session Laws of 1919, and on March 19th, 1919, by Chapter 101 of the Session Laws of 1919, and on March 20th, 1919, by Chapter 121 of the Session Laws of 1919. That none of such amendments made any change in said Chapter 31 material to the issues of this case. [9]

VIII.

That pursuant to said Chapter 31 of the Session Laws of 1917, the Board of Supervisors of defendant, Maricopa County, on April 10th, 1919, adopted an order calling an election of the property taxpayers of said county to be held May 17th, 1919, to determine whether the bonds of said county in the sum of Four Million (\$4,000,000.00) Dollars, should be issued and sold for the purpose of constructing and improving hard surfaced highways in said county, and said resolution specified that the rate of interest of said proposed bonds should be five and one-half ($5\frac{1}{2}\%$) per cent per annum, payable semi-annually, and the terms and dates of maturity of said bonds should be as follows:

“\$100,000.00 thereof to run for a term of 11 years and to mature on June 15, A. D. 1930;

\$100,000.00 thereof to run for a term of 12 years and to mature on June 15, A. D. 1931;

\$100,000.00 thereof to run for a term of 13 years to mature on June 15, A. D. 1932;

\$100,000.00 thereof to run for a term of 14 years and to mature June 15, 1933;

\$100,000.00 thereof to run for a term of 14 years and to mature June 15, 1933;

\$100,000.00 thereof to run for a term of 15 years and to mature on June 15, 1934;

\$200,000.00 thereof to run for a term of 16 years and to mature on June 15, 1935;

\$200,000.00 thereof to run for a term of 17 years and to mature on June 15, 1936;

\$200,000.00 thereof to run for a term of 18 years and to mature on June 15, 1937;

\$200,000.00 thereof to run for a term of 19 years and to mature on June 15th, 1938;

\$200,000.00 thereof to run for a term of 20 years and to mature on June 15, 1939;

\$200,000.00 thereof to run for a term of 21 years and to mature on June 15, 1940;

\$200,000.00 thereof to run for a term of 22 years and to mature on June 15, 1941; [10]

\$200,000.00 thereof to run for a term of 23 years and to mature on June 15, 1942;

\$200,000.00 thereof to run for a term of 24 years and to mature on June 15, 1943;

\$200,000.00 thereof to run for a term of 25 years and to mature on June 15, 1944;

\$300,000.00 thereof to run for a term of 26 years and to mature on June 13, 1945;

\$300,000.00 thereof to run for a term of 27 years and to mature June 15, 1946;

\$300,000.00 thereof to run for a term of 28 years and to mature June 15, 1947;

\$300,000.00 thereof to run for a term of 29 years and to mature June 15, 1948; and

\$300,000.00 thereof to run for a term of 30 years and to mature June 15, 1949.”

That notice of said election was given by posting and publication as provided by law and that said notice so posted and published was the order for election and contained the description of said bonds

as above set forth including the terms and dates of maturity thereof;

IX.

That said bonds were approved by the majority of the property taxpayers of the county at said election, and thereafter, on June 2nd, 1919, the said Board of Supervisors of said county canvassed the returns of said election and embodied the facts determined upon said canvass in a certificate and filed and recorded the same in the office of the County Recorder of said county, and in said certificate it was declared as follows:

“That the rate of interest upon said proposed bonds is to be five and one-half ($5\frac{1}{2}$) per cent per annum, payable semi-annually and the terms and dates of maturity of said bonds to be as follows, to-wit:

\$100,000.00 thereof to run for a term of 11 years and to mature on June 15, A. D. 1930;

\$100,000.00 thereof to run for a term of 12 years and to mature on June 15, A. D. 1931;

[11]

\$100,000.00 thereof to run for a term of 13 years to mature on June 15, A. D. 1932;

\$100,000.00 thereof to run for a term of 14 years and to mature on June 15, A. D. 1933;

\$100,000.00 thereof to run for a term of 15 years and to mature on June 15, A. D. 1934;

\$200,000.00 thereof to run for a term of 16 years and to mature on June 15, A. D. 1935;

\$200,000.00 thereof to run for a term of 17 years and to mature on June 15, A. D. 1936;

\$200,000.00 thereof to run for a term of 18 years and to mature on June 15, A. D. 1937;

\$200,000.00 thereof to run for a term of 19 years and to mature on June 15, A. D. 1938;

\$200,000.00 thereof to run for a term of 20 years and to mature on June 15, A. D. 1939;

\$200,000.00 thereof to run for a term of 21 years and to mature on June 15, A. D. 1940;

\$200,000.00 thereof to run for a term of 22 years and to mature on June 15, A. D. 1941;

\$200,000.00 thereof to run for a term of 23 years and to mature on June 15, A. D. 1942;

\$200,000.00 thereof to run for a term of 24 years and to mature on June 15, A. D. 1943;

\$200,000.00 thereof to run for a term of 25 years and to mature on June 15, A. D. 1944;

\$300,000.00 thereof to run for a term of 26 years and to mature June 15, A. D. 1945;

\$300,000.00 thereof to run for a term of 27 years and to mature on June 15, A. D. 1946;

\$300,000.00 thereof to run for a term of 28 years and to mature on June 15, A. D. 1947;

\$300,000.00 thereof to run for a term of 29 years and to mature on June 15, A. D. 1948;
and

\$300,000.00 thereof to run for a term of 30 years and to mature on June 15, A. D. 1949.”

X.

That thereafter, on June 4th, 1919, the said Board of Supervisors adopted a resolution preparing and

fixing the form of said bonds and in said resolution declared that "The bonds of the County of Maricopa to be issued and sold pursuant to [12] the county road bond election held May 17, 1919 in the total amount of Four Million (\$4,000,000.00) Dollars, shall be of the denomination of One Thousand (\$1,000.00) Dollars each; shall be Four Thousand (4,000) in number, shall be numbered from one (1) to four thousand (4,000) inclusive; shall be each dated June 15, 1919; shall each bear interest from date thereof at the rate of five and one-half (5½%) per cent per annum, payable semi-annually on the 15th day of June and December of each year at the office of the County Treasurer of said County of Maricopa; and shall mature upon the respective dates specified in the resolution of the Board of Supervisors dated April 10, 1919, calling the aforesaid election, and on the ballots used by the electors at said election and in the certificate of the Board of Supervisors heretofore and on June 1, 1919, filed in the office of the County Recorder of said Maricopa County; and shall each and all strictly conform in their tenor and terms to the aforesaid resolution calling said road bond election." That the form of bond thereafter set forth in said resolution is attached hereto and marked Exhibit "A" and made a part hereof.

That said resolution further provided

"that each of said series of four thousand bonds shall have attached thereto such number of semi-annual interest coupons in the sum of

Twenty-seven and 50/100 (\$27.50) Dollars, each, and payable on the 15th day of June and the 15th day of December of each year during the term of said bond as shall be sufficient to evidence all the interest to become due on said bond during the term thereof, and the form of each of said interest coupons is hereby prepared and fixed as follows, to-wit:

The County of Maricopa, State of Arizona, hereby promises to pay to the holder hereof on the 15th day of19....., at the office of the County Treasurer of [13] the County of Maricopa, State of Arizona, Twenty-seven and 50/100 (\$27.50) Dollars, in gold coin of the United States, the semi-annual interest on its highway bond numbered.....

Election of May 17, 1919.

W. K. Bowen

Chairman, Board of Supervisors
Maricopa County, State of
Arizona.

Attest:

Clarence L. Standage

Clerk, Board of Supervisors
Maricopa County, Arizona.

Coupon No.”

XI.

That no recital in said bonds or coupons nor any statement therein contained, gave any indication whatsoever that said bonds or any of them were

subject to call for redemption before their maturity dates, nor did any recital or statement in said bonds or coupons call attention to any statute, law, practice or custom, providing for the call of said bonds for redemption before their respective due dates, and no such statutes, law, practice or custom, ever existed or was suggested in the State of Arizona prior to the attempt to call such bonds for redemption in the year 1942.

XII.

That thereafter said Board of Supervisors caused to be published a notice inviting proposals for the purchase of said bonds, and said notice contained the following provision:

“Said bonds to be serial bonds, part of which shall mature on the 15th day of June of each year from the year 1930 to the year 1949, both inclusive, as more specifically described in that certificate of the Board of Supervisors relating to said bonds recorded in the office of the County Recorder of Maricopa County of June 2, 1919, in Book 19 of Miscellaneous Records, at page 357.”

That the certificate referred to was so recorded in the County Recorder's office and gave the dates of maturity of said bonds as set forth in the order for said bonds hereinabove [14] set forth.

XIII.

That bids for said bonds were received and the bid of Graves, Blanchet and Thornburgh and asso-

ciates, was accepted. Said bid contained the following provisions:

“For the Four Million Dollars par value legally issued Highway Bonds of Maricopa County, Arizona, complying in all respects with the description of same as contained in your official advertisement of sale, and to be delivered to us on the basis of delayed deliveries as outlined in your Official Notice of Sale, we will pay par and accrued interest to date of deliveries of the bonds, and in addition thereto a premium of Thirty-two Thousand Five Hundred (\$32,500.00) Dollars.”

XIV.

That after the said bid was accepted, and on the 9th day of July, 1919, defendant, Maricopa County, entered into a formal written contract with the bidders, providing for the sale and purchase of said bonds and that in said contract said Maricopa County expressly covenanted and agreed to sell to the purchasers and the purchasers covenanted and agreed to purchase from said Maricopa County, “the highway bonds of said Maricopa County authorized to be issued by the election held May 17th, 1919, in the amount of \$4,000,000.00 par value; said bonds to comply in all respects with the description of the same as contained in the ‘Notice Inviting Proposals’ hereinabove set forth.” That said contract was regularly executed by the Chairman and Clerk of the Board of Supervisors of said Maricopa County by authority of a resolution adopted by said Board of Supervisors on July 9th, 1919.

XV.

That after all of said issue of bonds had been executed upon the form set forth in "Exhibit A" hereto attached, and the bid of the purchasers therefor had been accepted, and the formal contract for the purchase thereof between said Maricopa [15] County and the purchasers had been executed, and after three thousand of said bonds had been delivered to the purchasers and one thousand of said bonds remained to be delivered to said purchasers the legislature of the State of Arizona adopted Chapter 54 of the Session Laws of 1921, ratifying, approving and validating said bonds and the sale thereof, and in said Act said legislature declared, "that the bonds of the County of Maricopa in the sum of Four Million (\$4,000,000.00) Dollars, authorized by the election of the property taxpayers of said county held May 17, 1919, for the purpose of providing funds for the construction and improvement of certain portions of the public highways of Maricopa County and the contract for the sale of such bonds entered into by the Board of Supervisors of said Maricopa County, with Graves, Blanchett, Thornburgh, and associates, on the 9th day of July, 1919, are hereby ratified, approved and declared valid," and in said Act said legislature further declared, "all acts and parts of acts in conflict with the provisions of this act are hereby repealed."

XVI.

That after the ratification of said bonds by said Chapter 54 of the Session Laws of 1921, they were

sold in the open market to various purchasers and, thereafter, in reliance upon the proceedings of the Board of Supervisors of Maricopa County fixing definite maturity dates for said bonds and providing for the payment of interest thereon at the rate specified in said bonds until the due dates thereof, and in reliance upon the above-mentioned Act of the legislature of the State of Arizona ratifying and approving said bonds in the form authorized as above set forth, and the contract and agreement entered into by said Maricopa County and the purchasers of said bonds, the State Treasurer of the State of Arizona, predecessor in office of defendant, Jim Brush, with the approval of the Governor and [16] Secretary of State, predecessors in office of defendants, Sidney P. Osborn and Dan E. Garvey, respectively, purchased Thirty-one Thousand (\$31,000.00) Dollars par value of the aforesaid bonds and paid therefor out of the trust funds in their control, under the provisions of Section 28 of said Enabling Act, in addition to the par value of said bonds, a large premium for the right to collect interest on said bonds at the rate therein specified until the respective maturity dates specified in said bonds; that said Thirty-one Thousand dollars par value of said bonds so purchased were purchased with funds belonging to and were placed in the State Permanent School Fund, which is one of the funds of said trust, and have so come into the possession of the defendant, Jim Brush, as State Treasurer, and are now so held by him.

XVII.

That pursuant to said Chapter 31 of the Session Laws of 1917 and amendments thereto the Board of Supervisors of defendant, Maricopa County, on November 30, 1920, adopted an order calling an election of the property taxpayers of said county to be held December 31, 1920, to determine whether the bonds of said county in the additional sum of \$4,500,000.00 should be issued and sold for the purpose of constructing and improving hard surfaced highways in said county, and said resolution specified that the rate of interest of said proposed bonds should be 6% per annum, payable semi-annually, and the terms and dates of maturity of said bonds should be as follows:

\$100,000.00 thereof to run for a term of 10 years and to mature on January 15, A. D. 1931,

\$100,000.00 thereof to run for a term of 11 years and to mature on January 15, A. D. 1932,

\$100,000.00 thereof to run for a term of 12 years and to mature on January 15, A. D. 1933,

\$100,000.00 thereof to run for a term of 13 years and to mature January 15, 1934, [17]

\$100,000.00 thereof to run for a term of 14 years and to mature on January 15, 1935,

\$200,000.00 thereof to run for a term of 15 years and to mature on January 15, 1936,

\$200,000.00 thereof to run for a term of 16 years and to mature on January 15, 1937,

\$200,000.00 thereof to run for a term of 17 years and to mature on January 15, 1938,

\$200,000.00 thereof to run for a term of 18 years and to mature on January 15, 1939,

\$200,000.00 thereof to run for a term of 19 years and to mature on January 15, 1940,

\$200,000.00 thereof to run for a term of 20 years and to mature on January 15, 1941,

\$200,000.00 thereof to run for a term of 21 years and to mature on January 15, 1942,

\$200,000.00 thereof to run for a term of 22 years and to mature on January 15, 1943,

\$200,000.00 thereof to run for a term of 23 years and to mature on January 15, 1944,

\$200,000.00 thereof to run for a term of 24 years and to mature on January 15, 1945,

\$300,000.00 thereof to run for a term of 25 years and to mature on January 15, 1946,

\$300,000.00 thereof to run for a term of 26 years and to mature January 15, 1947,

\$300,000.00 thereof to run for a term of 27 years and to mature January 15, 1948,

\$300,000.00 thereof to run for a term of 28 years and to mature January 15, 1949,

\$300,000.00 thereof to run for a term of 29 years and to mature January 15, 1950, and

\$500,000.00 thereof to run for a term of 30 years and to mature January 15, 1951.

That notice of said election was given by posting and publication as provided by law and that said notice so posted and published was the order for

election and contained the description of said bonds as above set forth, including the terms and dates of maturity thereof. [18]

XVIII.

That said bonds were approved by the majority of the property taxpayers of the county at said election and thereafter, on January 20, 1921, the said Board of Supervisors of said county canvassed the returns of said election and declared said bond issue to have been approved by said taxpayers and thereafter, on November 2, 1921, said Board of Supervisors embodied the facts determined from said canvass in a certificate and filed and recorded the same in the office of the county recorder of said county, and in said certificate it was declared as follows:

“The rate of interest upon the said proposed bonds shall be six percentum (6%) per annum, payable semi-annually and the terms and dates of maturity of said bonds shall be as follows, to-wit:

\$100,000.00 thereof to run for a term of 10 years and to mature on January 15, A.D. 1931;
\$100,000.00 thereof to run for a term of 11 years and to mature on January 15, A.D. 1932;
\$100,000.00 thereof to run for a term of 12 years and to mature on January 15, A.D. 1933;
\$100,000.00 thereof to run for a term of 13 years and to mature on January 15, 1934;

\$100,000.00 thereof to run for a term of 14 years and to mature on January 15, 1935;
\$200,000.00 thereof to run for a term of 15 years and to mature on January 15, 1936;
\$200,000.00 thereof to run for a term of 16 years and to mature on January 15, 1937;
\$200,000.00 thereof to run for a term of 17 years and to mature on January 15, 1938;
\$200,000.00 thereof to run for a term of 18 years and to mature on January 15, 1939;
\$200,000.00 thereof to run for a term of 19 years and to mature on January 15, 1940;
\$200,000.00 thereof to run for a term of 20 years and to mature on January 15, 1941;
\$200,000.00 thereof to run for a term of 21 years and to mature on January 15, 1942;
\$200,000.00 thereof to run for a term of 22 years and to mature on January 15, 1943; [19]
\$200,000.00 thereof to run for a term of 23 years and to mature on January 15, 1944;
\$200,000.00 thereof to run for a term of 24 years and to mature on January 15, 1945;
\$300,000.00 thereof to run for a term of 25 years and to mature on January 15, 1946;
\$300,000.00 thereof to run for a term of 25 years and to mature January 15, 1947;
\$300,000.00 thereof to run for a term of 27 years and to mature January 15, 1948;
\$300,000.00 thereof to run for a term of 28 years and to mature January 15, 1949;

\$300,000.00 thereof to run for a term of 29 years and to mature January 15, 1950; and \$500,000.00 thereof to run for a term of 30 years and to mature January 15, 1951."

XIX.

That thereafter, on the 2nd day of November, 1921, the said Board of Supervisors adopted a resolution preparing and fixing the form of said bonds and in said resolution declared that:

"The bonds of the County of Maricopa to be issued and sold pursuant to the County Road Bond Election held December 31, 1920, in the total amount of Four Million Five Hundred Thousand (\$4,500,000.00) Dollars, shall be in the denomination of One Thousand (\$1,000.00) Dollars each, shall be four thousand five hundred (4,500) in number, shall be numbered from 4,100 to 8,500 inclusive, shall each be dated January 15, 1921, shall each bear interest from the date thereof at the rate of 6% per annum, payable semi-annually, on the 15th day of January and July in each year at the office of the County Treasurer of the said County of Maricopa, State of Arizona, and shall mature upon the respective dates specified in the resolution of the Board of Supervisors, dated the 16th day of August, calling for the aforesaid election, and on the ballots for the electors in the said election and in the certificate of the

Board of Supervisors heretofore on the 8th day of November, 1921, filed in the office of the County Recorder of Maricopa County, and each and all shall strictly conform in tenor and terms to the aforesaid resolution calling said Road Bond Election, the ballots used by the electors at said election, and the aforesaid certificate of the Board of Supervisors recorded on November 8, 1921.” [20]

That the form of bond thereafter set forth in said Resolution is attached hereto, marked “Exhibit B”, and made a part hereof.

That said Resolution further provided,

“That each of said series of 4,500 bonds shall have attached thereto such number of semi-annual interest coupons in the sum of Thirty (\$30.00) Dollars each and payable on the 15th day of January and the 15th day of July of each year during the term of said bond as shall be sufficient to evidence all the interest to become due on said bond during the term thereof and the form of each of said interest coupons is hereby prepared and fixed as follows, to-wit: (except changes as to dates of payments) ‘The County of Maricopa, State of Arizona, hereby promises to pay to the holder hereof on the 15th day of January, 19....., at the office of the County Treasurer of the County of Maricopa, State of Arizona, Thirty (\$30.00) Dollars in

gold coin of the United States for the semi-annual interest on its highway bond No.....

Election of December 31, 1920.

.....
Chairman, Board of Supervisors
of Maricopa County, State of
Arizona.

Attest:

.....
Clerk, Board of Supervisors,
Maricopa County, State of
Arizona.

Coupon No.....' "

XX.

That no recital in said bonds or coupons or any statement therein contained gave any indication whatsoever that said bonds or any of them were subject to call for redemption before their maturity dates nor did any recital or statement in said bonds or coupons call attention to any statute, law, practice or custom providing for the call of said bonds for [21] redemption before their respective due dates and no such statute, law, practice or custom ever existed or was suggested in the State of Arizona prior to the attempt to call such bonds for redemption in the year 1942.

XXI.

That thereafter said Board of Supervisors caused to be published a notice inviting proposals for the

purchase of said bonds and said notice contained the following provision:

“Said bonds to be serial bonds, part of which will mature on the 15th day of January of each year from the year 1931 to the year 1951, both inclusive, as more specifically prescribed in that certificate of the Board of Supervisors relating to the said bonds, recorded in the office of the county recorder of said Maricopa County on November 8, 1921, in Book 24, page 345 of Miscellaneous Records;”

That the certificate referred to was so recorded in the County Recorder's office and gave the dates of the maturity of said bonds as set forth in the order for said bonds hereinbefore set forth.

XXII.

That bids for said bonds were received and the bid of Harris Trust & Savings Bank, William R. Compton Company, Northern Trust Company, Union Trust Company, and Bankers Trust Company, of Denver, was accepted. Said bid was made for the bonds containing the terms of the bonds as set forth in the form attached hereto, marked “Exhibit B,” and for the maturities set forth in the proceedings of said Board of Supervisors for the issuance of said bonds as hereinabove set forth, and the amount of said bid was Four Million Eight Hundred Thousand, One Hundred Fifty (\$4,800,150.00) Dollars, cash, for the four million five hundred thousand (\$4,500,000.00) Dollars of bonds.

XXIII.

That after the election of the property taxpayers approving issuance of said Four Million Five Hundred Thousand [22] (\$4,500,000.00) Dollars of bonds, and after the canvass of the results of said election, and after the determination of the maturities of said bonds as set forth in the order for election, and the call for said election, and as approved by the property taxpayers at said election and prior to the notice inviting proposals for the sale of said bonds, the legislature of the State of Arizona passed Chapter 86 of the Session Laws of 1921 ratifying, approving and validating the said bonds as authorized, to be issued and sold by the Board of Supervisors of said county at an election by the property taxpayers of said county held December 31, 1920, and that in and by said act the legislature of the State of Arizona declared that the said election "was a valid election and conferred upon the Board of Supervisors of said county the power and authority to issue and sell said bonds and that said bonds when issued and sold by said Board of Supervisors are hereby declared to be free from any defect or invalidity by reason of any act or omission of said Board of Supervisors in calling and holding said election or preparatory thereto;" that said act of the legislature became a law on or about June 14, 1921, and before said bonds were offered for sale.

XXIV.

That after said bonds were delivered to the said original purchasers thereof as hereinabove set forth

they were sold in the open market to various purchasers and thereafter in reliance upon the said proceedings of the Board of Supervisors of Maricopa County fixing definite maturity dates for said bonds and providing for the payment of interest at the rate specified in said bonds until the due dates therein specified, and in reliance on the act of the legislature of the State of Arizona above set forth ratifying and approving said bonds in the form authorized as above set forth and declaring the same free from any [23] defect, the State Treasurer of the State of Arizona, predecessor in office of defendant, Jim Brush, with the approval of the Governor and Secretary of State, predecessors in office of defendants, Sidney P. Osborn and Dan E. Garvey, respectively purchased Twenty-five Thousand (\$25,000.00) Dollars par value of the bonds last described and paid therefor out of the trust funds in their control, under the provisions of Section 28 of said Enabling Act, in addition to the par value of said bonds a large premium for the right to collect interest on said bonds at the rate specified therein until the respective maturity dates specified in said bonds; that said Twenty-five Thousand (\$25,000.00) Dollars par value of said bonds so purchased were purchased with funds belonging to and were placed in the State Permanent School Fund which is one of the funds of said trust and have so come into the possession of the defendant, Jim Brush, as State Treasurer, and are now so held by him.

XXV.

That after the issuance and delivery of said last issue of bonds in the year 1921, defendant, Maricopa County, regularly levied and collected taxes for each of the issues of bonds above set forth and made the semi-annual payments of interest out of the interest fund and retired those bonds that became due and payable on their respective due dates and at no time made any claim or assertion of any right to retire any of said bonds before their due dates until the year 1942; that in the year 1942 the Board of Supervisors of said Maricopa County adopted a resolution demanding that the State Loan Commissioners of the State of Arizona issue refunding bonds for the purpose of redeeming and refunding all of the bonds of the two issues above mentioned, including all bonds above described as owned and held in the above described trust, notwithstanding the fact that said bonds were not yet due and payable and contained [24] no provisions for retirement or redemption thereof before their respective due dates; that said Loan Commissioners of the State of Arizona refused to take any proceedings for such refunding, and, thereupon, the said Board of Supervisors of Maricopa County, Arizona, brought a mandamus proceeding in the Supreme Court of the State of Arizona to compel the State Loan Commissioners to refund and redeem said bonds under the provisions of Article 4 of Title 10, of Arizona Code Annotated, 1939, Sections 10-401 to 10-411. That the plaintiff in said mandamus pro-

ceeding was Maricopa County and the defendants therein were Sidney P. Osborn, Governor, Ana Frohmiller, State Auditor, and Joe Hunt, State Treasurer, constituting the Loan Commissioners of the State of Arizona; and that said plaintiff and said defendants were the only parties to said mandamus suit; and that none of the holders of any of the bonds of either of the issues above mentioned were parties to said suit, nor were their interests in any way represented in said suit. The Supreme Court of Arizona, upon the complaint filed by the plaintiff therein and the answer thereto filed by the defendants therein, entered its judgment ordering the said Loan Commissioners to proceed with the refunding of said bonds, and in its opinion stating that said Article 4 of Title 10, Arizona Code Annotated, 1939, was applicable to the redemption and refunding of the two issues of bonds of which the bonds held in the trust hereinabove described are a part; that thereafter and after the first day of January, 1943, the Board of Supervisors of Maricopa County again demanded that the said Loan Commissioners proceed with the refunding of said bonds and said Loan Commissioners thereupon adopted a resolution calling for bids for bonds to refund the whole remainder of the two issues hereinabove described remaining outstanding, including all of the bonds held in trust as hereinabove set forth; that [25] *that* in response to said call for bids only one bid was received and that said Loan Commissioners with the approval of said defendant, Maricopa

County, accepted said bid; and that, thereupon, the said bidder requested a further proceeding in the Supreme Court of Arizona to establish the legal validity of the said refunding bonds and to determine what notice must be given to call the outstanding bonds and stop the payment of interest thereon; that, thereupon, the said Loan Commissioners, with the approval of said Board of Supervisors of Maricopa County, refused to issue said bonds to the purchasers upon the ground that the legality of the same was doubtful and upon the further ground that the bonds to be refunded were not subject to call for redemption before their respective due dates and the same were not yet due; that thereupon said Maricopa County brought a further mandamus proceeding in the Supreme Court of Arizona to compel the State Loan Commissioners to issue and deliver said refunding bonds; that in said last mentioned mandamus proceeding Maricopa County was plaintiff and Sidney P. Osborn, Governor, Ana Frohmiller, State Auditor, and J. D. Brush, State Treasurer, constituting the Loan Commission of the State of Arizona, were defendants; that the parties above named were the only parties to said mandamus suit and none of the holders of any of the bonds proposed to be refunded were parties to or in any way represented in said mandamus suit; that on the 12th day of April, 1943, the Supreme Court of Arizona rendered its judgment in said mandamus suit, which judgment was based wholly on the allegations of the plaintiff's petition

for writ of mandamus, no facts other than those set forth in said writ being placed before the court by the defendants, and in said judgment said Supreme Court of Arizona directed said Loan Commissioners to proceed with said refunding and in its opinion reaffirmed the opinion rendered by it in the former suit [26] of Maricopa County vs. Osborn, et al, 125 P. (2) 703, stating that it was determined in said suit that the bonds of the two issues above mentioned were subject to redemption at any time prior to their fixed maturity dates, notwithstanding the fact that none of these bonds had matured or contained any provision on its face making them redeemable at the option of the county prior to their maturity dates, and further, stating that the bonds of the two issues above mentioned might be called by giving notice as provided for the paying and redemption of territorial warrants of the Territory of Arizona, as set forth in Section 2987 Revised Statutes of the Territory of Arizona of 1887, which was carried into the statutes of 1901 as Section 158 and which provided for calling territorial warrants by advertising in some paper published at the Capital at least two consecutive times, noticing readiness to redeem bonds to the extent of funds on hand and allowing at least thirty days for their presentation; that upon such publication interest on such warrants should cease; that said court in its said opinion stated that the above provision of the Statutes of 1887 remained in force as a part of the provisions of the law for refunding territorial indebtedness,

and that said provisions for refunding territorial indebtedness had been retained in force as a law of the State of Arizona, but it was not called to the attention of said Supreme Court for Arizona nor did said Supreme Court consider the fact that under the territorial law for refunding indebtedness as it stood when the Territory of Arizona became a state, there was no authority whatever to refund any indebtedness except indebtedness incurred prior to January 1st, 1897, and consequently on the theory that the State of Arizona adopted said Territorial Statute there could be no refunding of any indebtedness of any kind incurred after statehood, nor was there called to the attention [27] of said Supreme Court of Arizona, nor considered by said court, Acts 54 and 86 of Arizona Session Laws of 1921, expressly ratifying and approving the issues of bonds held to be callable after the form thereof containing specific due dates had been adopted, nor was there called to the attention of said Supreme Court of Arizona, nor considered by said court Chapter 39 of Arizona Session Laws of 1927 and the subsequent refunding acts of the State of Arizona, nor the relation of the acts for funding and refunding to the acts for the issuance of bonds for state and municipal indebtedness, nor was there set up in said mandamus proceeding, nor called to the attention of the court, that there was presented any question of the impairment of the obligation of the contract created by the issuance of said bonds by the changes in the statute made in the Revised

Code of Arizona for 1928; that apparently all of the parties to said mandamus suit were desirous of reaching the same result and no actual litigation of the rights of the holders of the bonds to be refunded, including the bonds above described held in the trust fund above mentioned, was had in said suits.

XXVI.

That the defendant, Jim Brush, as Treasurer of the State of Arizona, and the defendants, Sidney P. Osborn and Dan E. Garvey, as Governor and Secretary of the State of Arizona, respectively, assert and declare that they, as officials of the State of Arizona, are bound to abide by the decision of the Supreme Court of said state in the two above mentioned mandamus suits, and that they will surrender the above described Maricopa County Highway bonds held in trust for the schools of said State of Arizona, in deference to said decision of said Supreme Court immediately upon call for the redemption of said bonds being made in the manner declared valid by said Supreme Court of Arizona.

[28]

XXVII.

That by Section 28 of the Arizona Enabling Act, plaintiff alleges, there is imposed upon the defendants, Jim Brush, as Treasurer, and Sidney P. Osborn and Dan E. Garvey, as Governor and Secretary, respectively, of the State of Arizona, the duty to protect the school funds and other funds derived from the lands donated to the State of

and that said provisions for refunding territorial indebtedness had been retained in force as a law of the State of Arizona, but it was not called to the attention of said Supreme Court for Arizona nor did said Supreme Court consider the fact that under the territorial law for refunding indebtedness as it stood when the Territory of Arizona became a state, there was no authority whatever to refund any indebtedness except indebtedness incurred prior to January 1st, 1897, and consequently on the theory that the State of Arizona adopted said Territorial Statute there could be no refunding of any indebtedness of any kind incurred after statehood, nor was there called to the attention [27] of said Supreme Court of Arizona, nor considered by said court, Acts 54 and 86 of Arizona Session Laws of 1921, expressly ratifying and approving the issues of bonds held to be callable after the form thereof containing specific due dates had been adopted, nor was there called to the attention of said Supreme Court of Arizona, nor considered by said court Chapter 39 of Arizona Session Laws of 1927 and the subsequent refunding acts of the State of Arizona, nor the relation of the acts for funding and refunding to the acts for the issuance of bonds for state and municipal indebtedness, nor was there set up in said mandamus proceeding, nor called to the attention of the court, that there was presented any question of the impairment of the obligation of the contract created by the issuance of said bonds by the changes in the statute made in the Revised

Code of Arizona for 1928; that apparently all of the parties to said mandamus suit were desirous of reaching the same result and no actual litigation of the rights of the holders of the bonds to be refunded, including the bonds above described held in the trust fund above mentioned, was had in said suits.

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Arizona by the Federal Government, from loss, impairment or depletion by all lawful means within their power; and that it is the duty of said defendants, under the provisions of said Enabling Act, to resist the unlawful depletion of said trust funds by the above mentioned erroneous decisions of the Supreme Court of Arizona, by resorting to the Federal Courts to prevent the threatened unlawful call and redemption of said bonds, and the consequent depletion of the trust fund thereby; that the surrender of said bonds before their due date with the consequent loss caused thereby to said trust fund in deference to the above mentioned mandamus decisions of the State Supreme Court without submitting said question to the Federal Courts, which are charged with the duty of protecting said trust funds, will constitute a breach of trust by said defendants and entitles the plaintiff, as a citizen of the State of Arizona, to bring an action to restrain the contemplated surrender of said bonds.

XXVIII.

That notwithstanding the fact that the bid for the bonds proposed to be issued by the State Loan Commissioners for refunding the bonds of the two above mentioned issues is practically par for a $2\frac{3}{4}\%$ interest rate, the actual difference between the rates of 6% and $5\frac{1}{4}\%$ carried by the bonds of said issues which are sought to be redeemed, and the current interest rate of like bonds on the present market, is much greater, the current rate of interest

on such bonds being [29] approximately $2\frac{1}{4}\%$, the difference in said rate and the rate to which the proposed bonds are awarded to the bidder being due to the fact that there was only one bid, other bond purchasers having refrained from bidding because of the doubt as to the validity of said refunding bonds, arising from the fact that if the bonds proposed to be redeemed remain outstanding, the total indebtedness of said county would greatly exceed the statutory limitation.

XXIX.

That the said refunding proceedings hereinabove mentioned brought about by the defendant, Maricopa County, is a plan or device in which other counties, municipalities and school districts of the State of Arizona are participating and the purpose of said plan or device is to obtain the redemption of various outstanding issues of bonds held not only by Maricopa County but by other counties, municipalities and school districts in the State of Arizona; and that if said plan or device is successful to the extent of securing the refunding and redemption of the two issues of bonds hereinabove described many other bond issues of counties, municipalities, school districts and other subdivisions of the State of Arizona will be refunded and redeemed by like proceedings through the State Loan Commissioners under the same statutory provisions, and the same decisions of the Supreme Court of Arizona; that some of the municipalities and school districts of Arizona already have taken action looking toward

such refunding and will demand the same of the State Loan Commissioners as soon as the above described Maricopa County Highway bonds are successfully refunded; that the defendant, Jim Brush, as Treasurer of the State of Arizona, holds in the several funds of the trust created by Sections 24 to 28, both inclusive, of the Enabling Act of the State of Arizona, a total of over one million dollars [30] par value of bonds that will be subject to refunding under the above mentioned decisions of the Supreme Court of Arizona; and that the refunding and redemption of such bonds will cause a loss to the several funds of the trusts held by said defendant, Jim Brush, under the Enabling Act, of over one hundred thousand dollars; that some of said bonds are in identically the same legal situation under the above mentioned decisions of the Arizona Supreme Court with reference to the alleged right to refund as said Maricopa County Highway bonds, and others thereof are in a situation different only in the respect that they were issued after July 1, 1929, the date on which the Arizona Revised Code of 1928 took effect, and there has been no change in the statutes of Arizona pertaining to the refunding of such bonds since the issuance thereof, nor have said bonds been ratified and approved by acts of the legislature of the State of Arizona after the form of bond was approved; and that those of said bonds issued after said first day of July, 1929, are not subject to the contention that the legislature of Arizona has passed any law after their issuance im-

pairing the obligation of the contract created by their issuance, but said bonds are subject to the contentions herein made that the statutes of Arizona, neither at the time of the issuance of said bonds, nor at any time since, nor at the present time, authorize the refunding of said bonds and plaintiff herein asserts the right to have that question of interpretation of said statutes of Arizona determined in this suit by reason of the fact that this is a suit brought to protect a trust created under the Enabling Act of the State of Arizona, which is an Act of Congress by which it is made the duty of the Attorney General of the United States to restrain violations of said trust, and any citizen of the State of Arizona is given the same right. [31]

XXX.

That if the outstanding Maricopa County Highway bonds above described as held in trust by the defendant, Jim Brush, as Treasurer of the State of Arizona, are permitted to be called and the payment of interest thereon to be terminated as of the present date the loss to the trust fund above mentioned caused by such redemption will greatly exceed the sum or value of three thousand dollars; and that if the said refunding will proceed to include other like bonds above mentioned held in said trust fund the loss to the said trust fund caused by such redemption at the present time will greatly exceed the sum of one hundred thousand dollars.

XXXI.

That the call and redemption of the said Maricopa County Highway bonds in the manner directed, by the above mentioned decisions of the Supreme Court of Arizona will impair the obligation of the contract entered into by the County of Maricopa with the purchasers of the said Maricopa County Highway bonds at the time of the original sale and delivery thereof and will deprive the trust fund in charge of the defendant, Jim Brush, under the terms of the Enabling Act of the State of Arizona of property without due process of law, for the following reasons:

1. That the statute under which the defendants are proceeding to call and redeem said bonds and the only law under which said bonds can be called and redeemed, if at all, is Article 4 of Title 10, Arizona Annotated Code 1939, Sections 10-401 to 10-411, which first became a law of the State of Arizona as Article 4, Chapter 60 of Arizona Revised Code 1928, on the first day of July, 1929, some seven or eight years after the issuance of the above mentioned bonds. Section 2654 of said Article 4, Chapter 60 Arizona Revised Code 1928 reads [32] as follows:

“Sec. 2654. County or municipal bonds by state loan commissioners. The boards of supervisors of the counties and the municipal and school authorities, shall report to the state loan commissioners the bonded and outstanding indebtedness of the county, municipality or school

district, and, upon the demand of said authorities, the commissioners shall provide for the redeeming or refunding of such indebtedness in the same manner as other state indebtedness, and issue bonds of the state for any indebtedness allowed by law to be incurred by such county, municipality or school district. Such bonds shall be issued upon the faith and credit of the state only to the extent that it will cause to be levied and collected taxes for the payment of the principal and interest for such bonds, and pay the same when such bonds have been issued. The county, municipality, or school district shall pay into the state treasury, in addition to all other taxes authorized by law, such amounts as may be directed by the state board of equalization, or on their failure by the state auditor, to be levied for the payment of the principal and interest of such bonds issued for such county, municipality, or school district, in the same manner as is herein provided for the payment of the principal and interest of state indebtedness.”

That the above section provides that the Loan Commissioners upon demand of the board of supervisors “shall provide for the redeeming or refunding of such indebtedness in the same manner as other state indebtedness and issue bonds of the state for any indebtedness allowed by law to be incurred by such county, municipality or school district.”

The provision for refunding of state indebtedness referred to in said section is found in Section 2646 of said Article 4, which provides that the Loan Commissioners "shall provide for the payment of the state indebtedness due and to become due, now existing or hereafter authorized for the purpose of paying, redeeming and refunding all or any part of the principal and interest of the same from time to time, issue negotiable coupon bonds of the state when they can be issued at a lower rate of interest than previously paid, or when to the profit and benefit of the state;" that the defendant, Maricopa County, contends that [33] the bonds held in the trust hereinabove described and other like bonds may be redeemed and refunded under the provisions of Sections 2654 and 2646, without impairing the obligation of any contract between said Maricopa County and the holders of said bonds, for the reason that a similar right for the redemption and refunding of said bonds existed at the time of the issuance of said bonds under the provisions of Chapter I of Title 52, Sections 5251 and 5265 of Revised Statutes of Arizona, 1913, which were in force when said bonds of the plaintiffs were issued; that said contention of defendant, Maricopa County, is not well founded for the following reasons:

1. If there existed any right to redeem either of the bond issues above mentioned by virtue of any statute or law in force when said bonds were issued such right of redemption was excluded from application to said bond issues and each of them by

the Acts of the Legislature, (Chapters 54 and 86, Session Laws of 1921) approving and ratifying said bonds after the form of the bonds had been adopted and the covenants therein to pay the interest to definite maturity dates had become effective and made a matter of public record.

2. Chapter 1 of Title 52, Arizona Revised Statutes of 1913, in so far as is material in this connection, was a reenactment of Chapter 29 Arizona Session Laws of 1912, First Special Session, and said Chapter 29 of Arizona Session Laws of 1912, First Special Session, was a reenactment of the Act of Congress of June 25, 1890, Chapter 614, 51 Congress, First Session, as amended by the Act of Congress of August 3, 1894, Chapter 200, 53d Congress, Second Session, and further amended by Act of Congress of June 6, 1896, 29 Stat. 262, and that under the first of the above mentioned acts the refunding of county indebtedness was limited to indebtedness incurred prior [34] to December 31st, 1890, subject to the provision that said indebtedness might be validated or allowed after said date and that by the second of the above mentioned acts the county indebtedness permitted to be refunded was extended to include all indebtedness incurred prior to December 31, 1895, and that by the third of the above mentioned acts the final limit of county indebtedness to be refunded was extended to the first day of January, 1897, and that after said date no refunding of county indebtedness could be made under either of said acts, and that said acts by

virtue of the constitution of Arizona became the law of the State of Arizona upon said Territory of Arizona becoming a state and was reenacted without change in this respect by Chapter 29 of the Session Laws of 1912, First Special Session, and was again reenacted by Chapter I of Title 52 of Arizona Revised Statutes 1913, which was in force at the time of the issuance of the bonds held in the trust herein described; and that it was not until the Arizona Revised Code of 1928 became a law that said statute was amended or attempted to be amended so as to authorize the refunding of county and municipal indebtedness by the State Loan Commissioners by changing the intent and meaning of said statute; that the changes in said 1928 Code which made the provisions of said statute legally applicable to county and municipal indebtedness, if in fact they ever were so made applicable, consisted in changing the words "and they shall issue bonds for any indebtedness now allowed or that may be hereafter allowed by law to said county, municipal or school districts upon official demand of said authorities", to read: "The commissioners shall provide for the redeeming or refunding of such indebtedness in the same manner as other state indebtedness and issue bonds of the state for any indebtedness allowed by law to be incurred by such county, municipal or school district," and by providing [35] that such bonds "shall be issued upon the faith and credit of the state only to the extent that it will cause to be levied and collected taxes for

the payment of principal and interest of such bonds and pay the same when such bonds have been issued," and by eliminating the section in said Act requiring the state to pay the interest on said bonds out of the general fund if there was not sufficient money in the special fund, and by changing other provisions of said statute so that the state would be obligated to pay said bonds.

3. That the provision in Section 5260 in Chapter I, of Title 52, Revised Statutes of 1913, providing for funding and refunding, which defendants claim authorized the refunding of the bonds owned by the plaintiffs, at the time when the same were issued by the defendant, Maricopa County, was adopted, together with other provisions for refunding as a part of the reenactment of the Act of Congress of June 25, 1890, Chapter 614, 51st Congress, First Session, which was a part of the law of the Territory of Arizona before it became a state, and which by virtue of Section 2, Article XXII of the Constitution of Arizona, became a law of the state of Arizona in so far as the same was not inconsistent with the Constitution of Arizona, but any provision inconsistent with said Constitution did not become a law of said state; that said provision as it existed in said Act of Congress of June 25, 1890, made all indebtedness refunded under said provision indebtedness of the Territory of Arizona, and expressly obligated the Territory of Arizona to pay said bonds even though it did not collect the necessary taxes from the county to pay the same, (Par.

2047, page 106, Ariz. Revised Stat. 1901), and further expressly obligated the territory to pay the interest on said bonds out of the special fund collected from the county for the purpose and if said fund was not sufficient then to pay the same out of the [36] general fund of said territory, (Par. 2050, page 109, Ariz. Revised Stat. 1901), by Section 2 of Article XXII of the Constitution of Arizona when Arizona became a state the word, "state" was substituted for the word "territory" so that said obligation to pay said bonds was imposed upon the State of Arizona, but that said provision was in conflict with Section 5 of Article IX of the State Constitution which limited the indebtedness of the state to \$350,000.00 and expressly prohibited the creation of any indebtedness by the state for the purpose contemplated by said provision; and that said provision of Section 5260 Revised Code of 1913, if given the interpretation claimed by defendants, was likewise in violation of said section of the Constitution of the State of Arizona, and therefore, of no force and effect whatever; that for the reasons aforesaid, no bonds refunding county bonds could have been issued under Chapter I, Title 52 of the Revised Statutes of 1913, or any other law of the State of Arizona, prior to the enactment of Article 4, Chapter 60 of the 1928 Revised Code of Arizona, in which it was provided that the state should not be liable for county bonds refunded by the State Loan Commissioners.

XXXII.

That there can be no refunding of the above described bonds held in the above described trust under the provisions of Article 4, Chapter 10, of Arizona Annotated Code, 1939, which is the law that has superseded Article 4 of Chapter 60 of Arizona Revised Code of 1928, and is the law under which defendant, Maricopa County, claims the right to refund and redeem said bonds, for the reason that there is no effective provision for calling the bonds to be redeemed. The provision that may have been intended for said purpose is found in Section 10-406, Arizona Annotated Code of 1939, which provides that, "The treasurer shall give notice as for the payment and redemption of state [37] warrants of his readiness to redeem such indebtedness and thereafter interest on all such indebtedness due and outstanding shall cease." That there is not now and there never has been any provision of the law in the State of Arizona for giving notice for the payment and redemption of state warrants and that said Section 10-406 Arizona Annotated Code, 1939, and its predecessor, Section 2651, Revised Code of 1928, were wholly meaningless and ineffective; that the Supreme Court of Arizona in the decision in the mandamus suit made on April 11, 1943, stated that the notice prescribed for the redemption of territorial warrants by Section 2987 of the Revised Statutes of Arizona for 1887 was incorporated into the Arizona Territorial Statutes of 1901 and so

continued in all revisions of said territorial funding and refunding act down to the present time; but said Supreme Court of Arizona overlooked the fact that if the Acts of Congress providing for territorial funding and refunding had been carried into the laws of the state with all their incidents, notwithstanding that the acts creating such incidents have been repealed or have not been continued in the various statutes and codes of the State of Arizona adopted since statehood then said funding and refunding act has at no time been effective for the purpose of refunding any indebtedness since statehood, for the reason that it was not so effective when the Constitution of Arizona was adopted, by reason of the fact that no indebtedness created after January 1, 1897 could be refunded thereunder and further by reason of the fact that it was expressly rendered invalid by the limitation of indebtedness provided by the Constitution of the State of Arizona and the further fact that the legislature of the State of Arizona has recognized the fact that said provisions for funding and refunding are not in force by adopting a funding and refunding act applicable only to bonds when due or optional. [38]

XXXIII.

That the provisions of Chapter 2, Title LII of Arizona Revised Statutes of 1913, being Sections 5266-5285 of said statutes, prescribe a complete procedure for the issuance and sale of county and municipal bonds; that Section 5273 of said chapter

expressly requires that the order for election shall fix and state the date of maturity of said bonds, that Section 5274 expressly provides that said bonds shall be payable at a date not to exceed forty years from the date of their issuance. Section 5278 of said chapter expressly provides that the interest on said bonds shall be paid out of the tax levy provided for that purpose until said bonds are redeemed, and Section 5279 of said chapter expressly provides for a sinking fund to be created for the redemption of said bonds when the same shall mature, and Section 5281 of said chapter expressly provides that said bonds shall be called when they mature by notice for four weeks in some newspaper published in the county in which such bonds have been issued; that all of the aforesaid provisions are inconsistent with the interpretation of the provision in Chapter 1 of the same title, under which defendant, Maricopa County, claims the right to refund said bonds before maturity; that said two chapters were both enacted by the First Legislature of the State of Arizona, and were both inserted in the 1913 Code by the same legislature, and that said sections must be construed together and the provisions in Chapter 1 must be so construed as not to conflict with the provisions of said Chapter 2, and so construed the bonds under said Chapter 2 are refundable and redeemable only with the consent of the holders or when they have become optional under the terms of said bonds. That if there is any inconsistency between said Chapter 1 and Chapter 2, Title LII, the

provisions of said Chapter 2 must prevail for the reason that Chapter 1, by its enactment by Congress, [39] became a law of the Territory of Arizona, and by virtue of Section 2 of Article XXII of the Arizona Constitution, became a law of the State of Arizona upon Arizona becoming a state, and was such law when the first legislature of Arizona originally enacted said Chapter 2, (Chap. 29, Session Laws of 1912, Regular Session), hence, said Chapter 2, being the later enactment, repealed any inconsistent provision of said Chapter 1 by implication as well as by the express repeal provision contained in said Chapter 29, Session Laws of 1912.

XXXIV.

That if the provisions of Section 5260 Revised Statutes of 1913 were ever susceptible of an interpretation permitting the call for redemption of bonds when issued under Chapter 2, Title 52, Revised Statutes of 1913, such interpretation is conclusively precluded by the several refunding acts passed by the legislature of the State of Arizona after the issuance of the bonds owned and held by the plaintiffs in this case. By Chapter 39 of the Session Laws of 1927, county, municipal and school district bonds are authorized to be refunded upon certain conditions when and only when such indebtedness has "become payable at the option of such county, school district or municipality," and by Section 2668 of the Revised Code of 1928, such bonds are made refundable only upon certain con-

ditions. Likewise, by Chapter 32 Session Laws of 1933, such bonds are refundable only upon certain conditions and by Section 10-612 Arizona Annotated Code, 1939, said bonds are refundable only upon certain conditions; that the refunding proposed by defendants in this case does not comply with the conditions stated in any of said acts.

XXXV.

That the attempt of the defendant, Maricopa County, to deprive the holders of its Highway Bonds of the rate of interest [40] specified in the bonds held by them for the remainder of the term of said bonds, is an unlawful attempt to deprive said holders of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States; that the alleged right to call said bonds under the provisions of Article 4 of Chapter 10 of the Arizona Annotated Code of 1939, is contrary to the recognized interpretation of said statute from the time of its origin in the Act of Congress June 25, 1890, Chapter 614, 51st Congress, First Session; that said Act of Congress applied only to indebtedness existing at the date of said enactment which had been allowed or validated or might be allowed or validated after the passage of said act, the time for the allowance and validation of said indebtedness being extended by Act of Congress August 3, 1894, Chapter 200, 54th Congress, Second Session, and further extended by Act of Congress of June 6, 1896, 29 Stat. 262, the

last extension limiting the indebtedness to be refunded thereunder to the first day of January, 1897; that said acts were interpreted by several decisions of the court of the Territory of Arizona and the Supreme Court of the United States; and that under said decisions there could be no refunding under said act of county indebtedness incurred after January 1, 1897; that the provisions of said Act of Congress of June 25, 1890, were merely incorporated without change in the statutes adopted by the First Legislature of the State of Arizona and inserted in Chapter 1, Title LII of the Revised Code of 1913; that from the date of Statehood of Arizona, in 1912, to July 1, 1929, when the Revised Code of 1928 became effective, bonds issued under Chapter 1, Title LII, Revised Code of 1913, clearly became direct obligations of the State of Arizona and could not be issued because prohibited by Section 5 of Article 9 of the State Constitution; that the bonds which defendants [41] seek to refund in this case were issued under Chapter 2, Title LII, Revised Statutes of 1913, which contains provisions prescribing a complete procedure for the issuance of such bonds and provisions expressly requiring said bonds to be issued with definite maturity dates, and the interest to be paid until such maturity dates, a sinking fund to be created for the payment of the bonds at maturity, and for redemption of the bonds only after maturity. That the said provisions of Chapter 2, Title LII are wholly inconsistent with any right to call bonds issued under Chapter 2 that

may be implied from Chapter 1 of said Title LII, and said Chapter 1 becoming a statute of the State upon statehood, and said Chapter 2 being enacted by the legislature, and containing an express repeal provision, necessarily prevailed over said Section 1. That said bonds in the form in which they were issued were expressly ratified, approved and declared free from defects by the legislature of the State of Arizona before they were purchased at a premium for the trust fund, in reliance upon the express provisions of the statutes of the state; that at no time from statehood in the year 1912, until the year 1942, was there any suggestion by any public official of the County of Maricopa, or of the State of Arizona, that such bonds were callable for redemption before their maturity dates; that defendant, Maricopa County, has received and beneficially expended the money paid by the purchasers of said bonds upon the representation that said bonds would continue to bear the rate of interest therein specified until their due dates, now seeks to call said bonds for redemption in order that it may receive the benefit of the lower interest rates now existing; that there was paid out of the said trust moneys a large premium for the bonds purchased therefor, in good faith, in reliance upon the public acts of the Board of Supervisors of Maricopa County, as [42] the same appeared of record and upon the acts of the legislature of the State of Arizona, duly enacted, and that to deprive said trust fund of the right under the circumstances stated to

receive the specified rate of interest on said bonds for which a large premium was paid is to deprive the same of property without due process of law.

XXXVI.

That the plaintiff alleges that the facts herein set forth and, particularly, the fact that all bonds that have been issued by the counties, municipalities, school districts and other subdivisions of the State of Arizona from the beginning of statehood to the present time have specified definite maturity dates, in some cases with an express provision for call and redemption after a period of years, and in other cases without such provision, and have contained covenants by which the issuer of the bonds agreed to pay the interest at a specified rate according to coupons attached thereto until the maturity dates thereof; and that all public officers of the State of Arizona and the several counties thereof and the municipalities and school districts thereof have at all times construed the laws of the State of Arizona as requiring the issuance of bonds with definite maturity dates and in those cases where the bonds were to be approved by the taxpayers, as requiring the submission of definite maturity dates to said taxpayers, and said construction so uniformly placed upon the statutes of the state has been accepted and approved by the legislature of the state by expressly recognizing that bonds issued in such form are valid and enforceable according to their terms, and by expressly providing that due or op-

tional bonds only shall be subject to redemption, and by recognizing the right of counties, municipalities, school districts and other legal subdivisions to create and hold sinking funds and invest such sinking funds at a far less [43] rate of interest than their outstanding bonds, and the fact that said officials and the legislature of the State of Arizona have urged the purchase of numerous bonds of the counties, municipalities, school districts and other legal subdivisions of the state at substantial premiums, which purchase, if said bonds were callable at any time, constituted a gross fraud upon the purchasers and as to the State Treasurer and other state officers purchasing such bonds for the trust funds created by the Enabling Act, constituted a breach of trust, estopp the State of Arizona and all the counties, municipalities and school districts thereof from now asserting any right to redeem any of their said bonds contrary to the express terms of said bonds, and to permit the redemption of such bonds in the manner now sought by the defendant, Maricopa County, would operate as a fraud upon the holders of said bonds, and constitute a fraudulent diversion of trust monies derived from the lands donated to the state under the provisions of the Enabling Act.

XXXVII.

That the decisions of the Supreme Court of the State of Arizona made in the mandamus suits above referred to are not binding upon the Federal Courts for the following reasons:

1. That the interests of the bondholders holding any of said bonds were not represented before the court at either of said mandamus proceedings.

2. That the rights of the bondholders could not be litigated in said mandamus proceedings for the reason that under Section 4 of Article 6 of the State Constitution, the Supreme Court of Arizona has only limited jurisdiction in original mandamus proceedings against state officers.

3. That the issues of fact and law presented in this complaint have not been presented to the Supreme Court of the [44] State of Arizona in either of said mandamus proceedings and that said Supreme Court has in effect not passed upon said issues for the reason that the facts creating said issues have not been called to the attention of said court.

4. That any opinion that may have been expressed by the Supreme Court of Arizona that may have any bearing upon any of the issues presented in this complaint, is not binding upon the Federal Courts first, because the jurisdiction of the Federal Courts in this case is based upon Federal questions in which said courts must follow their own independent judgments, second, most of the issues presented by the complaint arise from the interpretation of an Act of Congress asserted by the Supreme Court of Arizona to have been incorporated into the state laws and the interpretation of said act is primarily a question for the Federal Courts, third, the case presents questions of estoppel against a state and its subdivisions and fourth, the case is a

case to prevent the officials of the state from depleting the trust fund held under the Enabling Act in violation of said act and the purpose of said act is to restrain all officials of the state, including the state judiciary from violating the terms of said act.

XXXVIII.

That this action is brought under the provisions of the Declaratory Judgment Act, being 28 U. S. Code Annotated, Section 400. Plaintiff alleges that he has the right under the Enabling Act to bring an action to enjoin defendants from committing the breach of trust herein alleged as about to be committed; that the defendants, Jim Brush, Sidney P. Osborn and Dan E. Garvey, as responsible officials of the State of Arizona, will probably respect the law as declared by this court without an actual issuance of an injunction; that the plaintiff has the right at all events under the Enabling Act [45] and the Declaratory Judgment Act above referred to, to have a determination of the alleged right to call the bonds held in said trust fund and to enjoin the depletion of said trust funds, if injunction be found necessary to restrain said defendants.

Wherefore, plaintiff prays that an adjudication may be made that defendant, Maricopa County, has no right to call the said Maricopa County Highway bonds now in the custody of the defendant, Jim Brush, as a part of the trust fund under the Enabling Act of the State of Arizona; and that it be adjudged, decreed and declared that said trust fund is entitled to have paid into it the rate of interest

specified in said bonds until the original due dates of said bonds, including the bonds of the issues other than the Maricopa County Highway bonds held in said trust; and that plaintiff be awarded such further relief as the court may deem proper and his costs.

GUST, ROSENFELD, DIVELBESS,
ROBINETTE & COOLIDGE,
201 Professional Building,
Phoenix, Arizona,

By J. L. GUST

Attorneys for Plaintiff [46]

EXHIBIT A

\$1000.00

United States of America
State of Arizona
County of Maricopa
Highway Bond
Election of May 17, 1919

No.....

No.....

The County of Maricopa, State of Arizona, for value received, hereby acknowledges itself indebted and promises to pay to the bearer hereof, on the 15th day of June A. D. 19....., the sum of One Thousand Dollars (\$1000.00) in gold coin of the United States, with interest hereon from date hereof in like gold coin at the rate of five and one-half per centum per annum, payable semi-annually on the 15th day of June and the 15th day of December of each year,

on presentation and surrender of the interest coupons hereto attached. Both principal and interest aforesaid shall be payable at the office of the Treasurer of the County of Maricopa, State of Arizona.

This bond is one of a series of four thousand bonds of the same date and tenor, except as to maturity, numbered respectively from 1 to 4,000, inclusive, and amounting in the aggregate to four million dollars (\$4,000,000.00).

This bond is issued by the Board of Supervisors of said County of Maricopa, for the purpose of constructing and improving public highways within and for the said County of Maricopa, pursuant to and in strict compliance with the Constitution of the State of Arizona, and the statutes thereof, including among others Chapter II of Title LII of the Revised Statutes of Arizona, 1913, Civil Code, and Chapter 3, of the Session Laws, Regular Session, 1917, and acts amendatory thereof and supplementary thereto, and in pursuance of a resolution of said Board of Supervisors duly adopted on the 31st day of March, 1919, and the report duly made by the Highway Commission for said county of Maricopa to said Board of Supervisors on the 10th day of April, 1919, and a resolution by said Board of Supervisors duly adopted upon receipt of said report and on said 10th day of April, 1919, and with the assent of a majority of the property taxpayers who were then qualified electors of said county voting at a special election legally called and duly held on the 17th day of May, 1919, for the purpose

of determining whether the above-mentioned series of bonds should be issued.

It is hereby certified, recited and declared that all acts, conditions and things, required to be performed, to exist and to happen, precedent to and in the issuance of this bond, have been performed, have existed and have happened in due time, form and manner, as required by law, and that the bonded and other indebtedness of said county, including this bond and all other bonds of the above-mentioned series, does not exceed ten per centum of the taxable property of said county as shown by the last assessment roll thereof. [47]

The full faith, credit and resources of the said County of Maricopa are hereby irrevocably pledged for the punctual payment of the principal and interest of this bond.

In Witness Whereof the said County of Maricopa by its Board of Supervisors has caused this bond to be signed by the Chairman and attested by the Clerk of said Board of Supervisors and the seal of the said Board of Supervisors to be hereunto affixed this 15th day of June, 1919.

W. K. BOWEN

Chairman of the Board of Supervisors
of the County of Maricopa, State of
Arizona.

Attest:

CLARENCE L. STANDAGE

Clerk of the Board of Supervisors
of the County of Maricopa, State
of Arizona.

2. That each of the said series of four thousand (4,000) bonds shall have attached thereto such number of semi-annual interest coupons in the sum of twenty-seven dollars and fifty cents (\$27.50) each, and payable on the 15th day of June and the 15th day of December of each year during the term of said bond, as shall be sufficient to evidence all the interest to become due on said bond during the term thereof; and the form of each of said interest coupons is hereby prepared and fixed as follows, to-wit:

The County of Maricopa, State of Arizona, hereby promises to pay to the holder hereof on the 15th day of, 19....., at the office of the County Treasurer of the County of Maricopa, State of Arizona, twenty-seven dollars and fifty cents in gold coin of the United States, for the semi-annual interest on its highway bond numbered.....

Election of May 17, 1919.

W. K. BOWEN

Chairman of the Board of Supervisors
of Maricopa County, State of Arizona.

Attest:

CLARENCE L. STANDAGE

Clerk of the Board of Supervisors of
Maricopa County, State of Arizona.

\$27.50

Coupon Number.....

3. That the following form for registration shall be printed on the back of each of said bonds as many times as space will reasonably permit, to-wit:

This bond is registered pursuant to the statutes in such case made and provided in the name of, and the interest and principal thereof are hereby payable to such owner.

.....
State Auditor [48]

EXHIBIT B

\$1000.00

United States of America

State of Arizona

County of Maricopa

Highway Bond

Election of December 31, 1920

No.....

No.....

The County of Maricopa, State of Arizona, for value received, hereby acknowledges itself indebted and promises to pay to the bearer hereof, on the 15th day of January, A. D., 19....., the sum of One Thousand Dollars (\$1000.00) in gold coin of the United States, with interest hereon from date hereof in like gold coin at the rate of six per centum per annum, payable semi-annually on the 15th day of January and the 15th day of July of each year, on presentation and surrender of the interest coupons hereto attached. Both principal and interest afore-said shall be payable at the office of the Treasurer of the County of Maricopa, State of Arizona, or at in the City of New York.

This bond is one of a series of four thousand five hundred bonds of the same date and tenor except

as to maturity, numbered respectively from four thousand one (4,001) to eight thousand five hundred (8,500) inclusive, and amounting in the aggregate to Four Million Five Hundred Thousand Dollars (\$4,500,000.00).

This bond is issued by the Board of Supervisors of said County of Maricopa, for the purpose of constructing and improving public highways within and for the said County of Maricopa, pursuant to and in strict compliance with the Constitution of the State of Arizona, and the statutes thereof, including among others Chapter II of Title LII of the Revised Statutes of Arizona, 1913, Civil Code, and Chapter 31 of the Session Laws of Arizona, Regular Session, 1917, and acts amendatory thereof and supplementary thereto, and in pursuance of a resolution of said Board of Supervisors duly adopted on the 16th day of August, 1920, and the report duly made by the Highway Commission for said County of Maricopa to said Board of Supervisors on the 16th day of August, 1920 and a resolution by said Board of Supervisors duly adopted upon receipt of said report and on said 16th day of August, 1920, and with the assent of a majority of the property taxpayers who were then qualified electors of said county voting at a special election legally called and duly held on the 31st day of December, 1920, for the purpose of determining whether the above-mentioned series of bonds should be issued.

This bond is of the issue which was validated by

Act of Legislature of State of Arizona in its Regular Session, 1921, by passage of Senate Bill No. 160, which was approved March 14th, 1921.

It is hereby certified, recited and declared that all acts, conditions and things, required to be performed, to exist and to happen, precedent to and in the issuance of this bond, have been performed, have existed and have happened in due time, form and manner as required by law, and that the bonded and [49] other indebtedness of said county, including this bond and all other bonds of the above-mentioned series, does not exceed ten per centum of the taxable property of said county as shown by the last assessment roll thereof.

The full faith, credit and resources of the said County of Maricopa, are hereby irrevocably pledged for the punctual payment of the principal and interest of this bond.

In Witness Whereof the said County of Maricopa by its Board of Supervisors has caused this bond to be signed by the Chairman and attested by the Clerk of said Board of Supervisors, and the seal of the said Board of Supervisors to be hereunto affixed this 15th day of January, 1921.

GUY F. VERNON

Chairman of the Board of Supervisors,
of the County of Maricopa, State of
Arizona.

Attest:

Clerk, of the Board of Supervisors,
of the County of Maricopa, State
of Arizona.

2. That each of the said series of four thousand five hundred (4,500) bonds shall have attached thereto such number of semi-annual interest coupons in the sum of Thirty Dollars (\$30.00) each, and payable on the 15th day of January and the 15th day of July of each year during the term of said bond, as shall be sufficient to evidence all the interest to become due on said bond during the term thereof; and the form of each of said interest coupons is hereby prepared and fixed as follows, to-wit: (Except changes as to date of payments):

“The County of Maricopa, State of Arizona, hereby promises to pay to the holder hereof on the 15th day of January, 19....., at the office of the County Treasurer of the County of Maricopa, State of Arizona, Thirty Dollars (\$30.00) in gold coin of the United States, for the semi-annual interest on its highway bond numbered.....

Election of December 31st, 1920.

.....
Chairman of the Board of Supervisors
of Maricopa County, State of Arizona.”

Attest:

.....
Clerk of the Board of Supervisors
of Maricopa County, State of Arizona.

\$30.00

Coupon Number.....

3. That the following form for registration shall be printed on the back of each of said bonds as many times as space will reasonably permit, to-wit:

[50]

.....19.....

This bond is registered pursuant to the statutes in such case made and provided and in the name of, and the interest and principal thereof are hereafter payable to such owner.

.....
State Auditor

[Endorsed]: Filed Apr. 16, 1943. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Ruby A. Ballard, Deputy Clerk. [51]

—————
[Title of District Court and Cause.]

ANSWER OF DEFENDANTS

Come now the defendants Jim Brush, State Treasurer of the State of Arizona, Sidney P. Osborn, Governor of the State of Arizona, Dan E. Garvey, Secretary of State of the State of Arizona, Maricopa County, John A. Foote, Ed Oglesby and Phil Isley, constituting the Board of Supervisors of Maricopa County, Arizona, and for answer to the

complaint of plaintiff on file herein, admit, allege, and deny as follows:

FIRST DEFENSE

I.

The complaint fails to state a claim against defendants upon which relief can be granted.

SECOND DEFENSE

I.

For answer to paragraph I of plaintiff's complaint, defendants allege that they do not have knowledge or information sufficient to admit that plaintiff is a citizen, a resident and taxpayer of the State of Arizona, and for the lack of such information deny [52] the same. Defendants further deny that plaintiff has the right to enforce the trusts created by Sections 24, 25, 26, 27 and 28 of the Enabling Act (Act of Congress approved June 20, 1910) admitting the State of Arizona into the Union of States.

II.

Defendants admit the allegations of paragraph II of plaintiff's complaint.

III.

Defendants deny the allegations of paragraph III of plaintiff's complaint.

IV.

For answer to paragraph IV of the plaintiff's complaint, defendants deny that the difference be-

tween the interest rates upon the bonds therein referred to authorizes plaintiff herein to maintain this action, but allege that neither the Constitution of the United States nor the laws of Congress confer jurisdiction upon this court to entertain this action by plaintiff in the capacity by which he sues. Defendants admit the remaining allegations of said paragraph IV of plaintiff's complaint describing the issues of bonds therein pleaded, but allege that outstanding Maricopa County Highway Bonds are redeemable by the Loan Commissioners of the State of Arizona prior to their maturity dates, as provided by Chapter 1, Title 52, Revised Statutes of Arizona, 1913, and the decisions of the Supreme Court of Arizona construing said chapter entitled: *Maricopa County vs. Osborn, et al.*, *Ariz.* 125 *Pac.* (2d) 703, and *Maricopa County vs. Osborn, et al.*, *Ariz.* 136 *Pac.* (2d) 270 (*Pacific Reporter Advance Sheets*, May 14, 1943, Vol. 1, p. 270).

V.

Defendants admit the allegations of paragraph V of plaintiff's complaint. [53]

VI.

For answer to paragraph VI of plaintiff's complaint, defendants admit the enactment of Chapter 2, Title 52, Revised Statutes of Arizona, 1913, but allege that said outstanding Maricopa County Highway Bonds are redeemable prior to their maturity dates as provided by Chapter 1, Title 52, Revised

Statutes of Arizona, 1913, and the decisions of the Supreme Court of Arizona construing said chapter, as aforesaid. Defendants deny each and every remaining allegation contained in said paragraph VI of plaintiff's complaint.

VII.

Defendants admit the allegations of paragraphs VII, VIII, IX, and X of plaintiff's complaint.

VIII.

For answer to paragraph XI of plaintiff's complaint, defendants allege that notwithstanding the recitals contained in said bonds, or the coupons attached thereto, said bonds are redeemable prior to their maturity dates as provided by Chapter 1, Title 52, Revised Statutes of Arizona, 1913, and the decisions of the Supreme Court of Arizona, as aforesaid.

IX.

Defendants admit the allegations of paragraphs XII, XIII, XIV and XV of plaintiff's complaint.

X.

For answer to paragraph XVI of plaintiff's complaint defendants admit that said Maricopa County Highway Bonds were sold in the open market to various purchasers thereof, but defendants allege that notwithstanding the sale and purchase of said bonds, as in said paragraph alleged, said bonds are redeemable prior to their maturity dates as provided by Chapter 1, Title 52, Revised Statutes of

Arizona, 1913, and the decisions of the Supreme Court [54] of Arizona construing said chapter, as aforesaid.

XI.

Defendants admit the allegations of paragraphs XVII, XVIII, and XIX of plaintiff's complaint.

XII.

For answer to paragraph XX of plaintiff's complaint, defendants allege that notwithstanding the recitals contained in said bonds, or the coupons attached thereto, said bonds are redeemable prior to their maturity dates as provided by Chapter 1, Title 52, Revised Statutes of Arizona, 1913, and the decisions of the Supreme Court of Arizona construing said chapter, as aforesaid.

XIII.

Defendants admit the allegations of paragraphs XXI, XXII, and XXIII of plaintiff's complaint.

XIV.

For answer to paragraph XXIV of plaintiff's complaint, defendants admit that said Maricopa County Highway Bonds were sold in the open market to various purchasers thereof, but these defendants allege that notwithstanding the sale and purchase of said bonds, as in said paragraph alleged, said bonds are redeemable prior to their maturity dates as provided by Chapter 1, Title 52, Revised Statutes of Arizona, 1913, and the decisions of the Supreme Court of Arizona, as afore-

said. For further answer to said paragraph XXIV of plaintiff's complaint, defendants allege that at the time said Maricopa County Highway Bonds were purchased by the State Treasurer of the State of Arizona, with the approval of the Governor and Secretary of State of Arizona, said Chapter 1, Title 52, Revised Statutes of Arizona, 1913, was in full force and effect as a law of the State of Arizona, and that at the time said Maricopa County Highway Bonds were authorized, issued and sold, said Chapter 1, [55] Title 52, Revised Statutes of Arizona, 1913, became a part of said bonds, and a part of said contract between Maricopa County and the purchasers of said bonds whereby said bonds were sold and delivered to the purchasers thereof, and that by reason thereof said Maricopa County Highway Bonds have been, from the date of their issue, and now are, subject to redemption prior to their maturity dates, as provided by said Chapter 1, Title 52, Revised Statutes of Arizona, 1913, and the decisions of the Supreme Court of Arizona construing said chapter, as aforesaid.

XV.

For answer to paragraph XXV of plaintiff's complaint, defendants admit that Maricopa County levied and collected taxes to retire the principal and interest of said Maricopa County Highway Bonds therein described as the same became due and payable, and further admit that in the year 1942, the Board of Supervisors of Maricopa County adopted a resolution demanding that the Loan

Commissioners of the State of Arizona issue bonds for the purpose of refunding said Maricopa County Highway Bonds then outstanding, and further admit that Maricopa County brought an original proceeding in mandamus in the Supreme Court of the State of Arizona to compel the Loan Commissioners of the State of Arizona to refund said outstanding Maricopa County Highway Bonds, and admit that the Supreme Court of the State of Arizona, in said proceeding, entered judgment commanding the Loan Commissioners of the State of Arizona to refund and call said outstanding Maricopa County Highway Bonds, but deny that the Supreme Court of the State of Arizona held that said Maricopa County Highway Bonds were refundable under the provisions of Article 4 of Title 10, Arizona Code Annotated, 1939, but in this respect allege that both of the decisions of the Supreme Court of the State of Arizona, as aforesaid, [56] held that said Maricopa County Highway Bonds were refundable under the provisions of Chapter 1, Title 52, Revised Statutes of Arizona, 1913. Defendants allege that J. L. Gust, attorney for plaintiff in this cause of action, appeared in said mandamus proceeding in the Supreme Court of the State of Arizona as counsel for the owner and holder of some of said Maricopa County Highway Bonds and while ostensibly appearing in said mandamus proceeding as a friend of the court, nevertheless in fact represented said bondholder, and in said mandamus proceeding was entitled to, and could have

presented and raised all the issues the said J. L. Gust now raises as counsel for plaintiff herein. That a copy of the brief filed in the Supreme Court of the State of Arizona in said original mandamus proceeding by the said J. L. Gust, as attorney for said bondholder, is attached to the affidavit of Leslie C. Hardy filed herein contemporaneously with this answer and marked "Exhibit C", and by reference herein incorporated as if made a part hereof. Defendants deny each and every remaining allegation in said paragraph XXV of plaintiff's complaint.

XVI.

Defendants admit the allegations of paragraph XXVI of plaintiff's complaint.

XVII.

For answer to paragraph XXVII of plaintiff's complaint, defendants admit that a duty is imposed by law upon the defendants Jim Brush, as Treasurer of the State of Arizona, and Sidney P. Osborn and Dan E. Garvey, as Governor and Secretary, respectively, of the State of Arizona, to conserve and protect funds of the State of Arizona derived from lands donated to said state by the federal government, but defendants deny that said officials of the State of Arizona are failing to protect and conserve said funds [57] and particularly such of said funds as have been invested in said Maricopa County Highway Bonds. Defendants allege that the laws of the State of Arizona, as con-

strued by the Supreme Court of said state, as aforesaid, authorized the refunding of said Maricopa County Highway Bonds by the Loan Commissioners of the State of Arizona from the date of their issue, and that the refunding of said outstanding Maricopa County Highway Bonds proceeds from the authority of the State of Arizona, the fulfillment of which is an obligation resting upon the Governor, the Treasurer, and the Auditor of the State of Arizona, with which the plaintiff herein is not by law concerned and with which he is not authorized by law to interfere. Defendants deny each and every remaining allegation of paragraph XXVII of plaintiff's complaint.

XVIII.

Defendants deny the allegations of paragraph XXVIII of plaintiff's complaint.

XIX.

For answer to paragraph XXIX of plaintiff's complaint, defendants deny that the refunding of said Maricopa County Highway Bonds is a plan or device by Maricopa County to redeem said outstanding Maricopa County Highway Bonds, but allege that the redemption of said outstanding Maricopa County Highway Bonds is authorized by Chapter 1, Title 52, Revised Statutes of Arizona, 1913, as construed by the decisions of the Supreme Court of Arizona, as aforesaid. Defendants allege that they are without knowledge or information sufficient

to form a belief as to the truth of the allegations concerning the plan which other counties of the State of Arizona, as well as municipalities, school districts and other subdivisions of the State of Arizona, propose to pursue with respect to the refunding of their outstanding bonds, but in this [58] respect defendants allege that the truth or falsity of said allegations is wholly immaterial to the issues involved in the cause of action herein. Defendants further allege that the Maricopa County Highway Bonds held in the Treasury of the State of Arizona, under the provisions of said Enabling Act, were, at the date of their issue, and are now, subject to redemption as provided by Chapter 1, Title 52, Revised Statutes of Arizona, 1913, as construed by the decisions of the Supreme Court of Arizona, as aforesaid, and that the redemption of said bonds will not, and cannot, violate any trust under which said bonds are held. Defendants allege that the allegations of said paragraph XXIX of plaintiff's complaint, insofar as they refer to bonds other than outstanding Maricopa County Highway Bonds which are subject to redemption by the Loan Commissioners of the State of Arizona, as aforesaid, are wholly immaterial and are beyond the issues involved in this cause of action. These defendants deny that a citizen of the State of Arizona is authorized to institute a suit in the United States District Court for the District of Arizona to enforce any right which plaintiff asserts he is entitled to enforce in this cause of action. Defendants deny each

and every remaining allegation of said paragraph XXIX of plaintiff's complaint.

XX.

For answer to paragraph XXX of plaintiff's complaint, defendants allege that the allegations thereof are wholly immaterial and are of matters and things of which plaintiff herein is not lawfully concerned. Defendants allege that said outstanding Maricopa County Highway Bonds are subject to redemption before maturity as provided by Chapter 1, Title 52, Revised Statutes of Arizona, 1913, as construed by the Supreme Court of the State of Arizona, as aforesaid. [59]

XXI.

For answer to paragraph XXXI of plaintiff's complaint, defendants admit the enactment of the provisions of law and the decisions of the Supreme Court of the State of Arizona as set forth in said paragraph of plaintiff's complaint, but defendants deny that said laws, or any of them, or said decisions of the Supreme Court of Arizona, will impair the obligation of contract entered into by Maricopa County with the purchasers of said Maricopa County Highway Bonds, and further deny that said laws, or any of them, or said decisions, will deprive the trust funds of the State of Arizona held under the terms of the Enabling Act of property without due process of law. For further answer to paragraph XXXI of said complaint defendants deny each and every remaining allegation thereof, and

in support of such denial, and for further answer to the allegations of said paragraph XXXI of plaintiff's complaint, defendants allege that said outstanding Maricopa County Highway bonds are subject to redemption prior to their maturity dates as provided by Chapter 1, Title 52, Revised Statutes of Arizona, 1913, as construed by the Supreme Court of the State of Arizona, as aforesaid.

XXII.

For answer to paragraph XXXII of plaintiff's complaint, defendants admit the enactment and provisions of the various laws therein referred to, but deny each and every other allegation in said paragraph XXXII of plaintiff's complaint, and in this respect defendants allege that the law of the State of Arizona is and has been finally and conclusively adjudicated by the Supreme Court of the State of Arizona by the decisions of said court hereinabove referred to, and the judgments of said court peremptorily commanding said Loan Commissioners of the State of Arizona to refund said outstanding Maricopa County Highway Bonds. [60]

XXIII.

For answer to paragraph XXXIII of plaintiff's complaint, defendants admit the enactment and provisions of the various laws therein referred to, but deny each and every other allegation in said paragraph XXXIII of plaintiff's complaint, and in this respect defendants allege that the law of the State of Arizona is and has been finally and con-

clusively adjudicated by the Supreme Court of the State of Arizona by the decisions of said court hereinabove referred to, and the judgments of said court peremptorily commanding said Loan Commissioners of the State of Arizona to refund said outstanding Maricopa County Highway Bonds.

XXIV.

For answer to paragraph XXXIV of plaintiff's complaint, defendants admit the enactment and provisions of the various laws therein referred to, but deny each and every other allegation in said paragraph XXXIV of plaintiff's complaint, and in this respect defendants allege that the law of the State of Arizona is and has been finally and conclusively adjudicated by the Supreme Court of the State of Arizona by the decisions of said court hereinabove referred to, and the judgments of said court peremptorily commanding said Loan Commissioners of the State of Arizona to refund said outstanding Maricopa County Highway Bonds.

XXV.

For answer to paragraph XXXV of plaintiff's complaint, defendants deny that the refunding of said Maricopa County Highway Bonds will deprive the owners thereof of their property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States. Defendants allege that plaintiff, who does not allege that he is an owner and holder of such bonds, is not

authorized to claim, or assert in this action a denial of [61] due process of law on behalf of owners and holders of such bonds who are not parties to this suit and who are not complaining of denial of due process of law. Defendants deny that the refunding of said Maricopa County Highway Bonds will deprive the trust fund of the State of Arizona in which said bonds are deposited and held of property without due process of law. Defendants admit the enactment and provisions of the various laws therein referred to, but deny each and every other allegation in said paragraph XXXV of plaintiff's complaint, and in this respect defendants allege that the law of the State of Arizona is, and has been, finally and conclusively adjudicated by the Supreme Court of the State of Arizona as set forth in the decisions of said court hereinabove referred to, and the judgments of said court peremptorily command said Loan Commissioners of the State of Arizona to refund said outstanding Maricopa County Highway Bonds.

XXVI.

Defendants deny the allegations of paragraphs XXXVI, XXXVII, and XXXVIII of plaintiff's complaint.

THIRD DEFENSE

Defendants allege that the cause of action set forth in the plaintiff's complaint, if any, is barred by the decisions and judgments of the Supreme Court of the State of Arizona, as aforesaid, com-

manding the Loan Commissioners of the State of Arizona to refund said Maricopa County Highway Bonds, and that said decisions and judgments are res adjudicata of said cause of action, and constitute the rule of decision to be followed and applied by this court to the complaint herein.

FOURTH DEFENSE

Defendants allege that plaintiff herein has instituted this suit for the purpose of harrassing these defendants, and each [62] of them, and for the purpose of delaying, impeding, hindering, and obstructing these defendants from carrying out and complying with the peremptory writs of mandamus issued out of the Supreme Court of the State of Arizona, as aforesaid, and that the maintenance of this suit by plaintiff constitutes vexatious litigation.

Wherefore defendants pray that plaintiff be denied the relief prayed for by the complaint herein, and that said complaint be dismissed; for such other and further relief as may be meet and proper in the premises; and for their costs herein expended.

JOE CONWAY

Attorney General

EARL ANDERSON

Chief Assistant Attorney General

Attorneys for Defendants who
are officials of the State of
Arizona.

HAROLD R. SCOVILLE

Maricopa County Attorney

LESLIE C. HARDY

Special Counsel for Maricopa County

Attorneys for Defendants Maricopa

County and the officials of Mari-

copa County, Arizona

[Endorsed]: Filed May 22, 1943. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Gwen Roby, Deputy Clerk. [63]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR SUMMARY
JUDGMENT

To: Messrs. Gust, Rosenfeld, Divelbess, Robinette
& Coolidge, attorney for plaintiff herein:

Please take notice, that on the 7th day of June, 1943, at the hour of 10:00 A. M., or as soon thereafter as counsel can be heard, the undersigned attorneys for the defendants herein will appear before the Judge of the above entitled Court, and move that summary judgment be entered herein in accordance with Rule 56 of the Federal Rules of Civil Procedure for the District Courts of the United States.

In support of said motion for summary judgment the undersigned counsel for the defendants herein will file with the Clerk of the above entitled Court,

as constituting a part of the record herein, the following:

1. Motion for Summary Judgment Under Rule 56(b).
2. Affidavit in Support of Motion for Summary Judgment, executed by Earl Anderson.
3. Affidavit in Support of Motion for Summary Judgment, executed by Leslie C. Hardy.
4. Answer of Defendants. [64]
5. Memorandum of Points and Authorities on Behalf of all Defendants in Support of Motion for Summary Judgment.

Copies of each and all of the foregoing enumerated documents are herewith served upon you as counsel for plaintiff herein.

At the time indicated, as aforesaid, the documents above enumerated, together with the complaint on file herein, and such other parts of the record herein as may be appropriate thereto, will be presented to the Judge of the above entitled Court for his consideration in disposing of said motion for summary judgment.

Dated this 22nd day of May, 1943.

JOE CONWAY

Attorney General

EARL ANDERSON

Chief Assistant Attorney General
Attorneys for Defendants who
are officials of the State of
Arizona

HAROLD R. SCOVILLE

Maricopa County Attorney

LESLIE C. HARDY

Special Counsel for Maricopa County
Attorneys for Defendants Maricopa
County and the officials of Maricopa
County, Arizona.

On this 22 day of May, 1943, the undersigned counsel for the plaintiff herein, do hereby admit service of copies of the foregoing Notice of Motion for Summary Judgment, together with the documents enumerated therein and numbered from one to five inclusive.

GUST, ROSENFELD, DIVELBESS,
ROBINETTE & COOLIDGE

By J. L. GUST (f)

Attorneys for the Plaintiff

[Endorsed]: Filed May 22, 1943. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Gwen. Roby, Deputy Clerk. [65]

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT
UNDER RULE 56(b)

Defendants Jim Brush, State Treasurer of the State of Arizona, Sidney P. Osborn, Governor of the State of Arizona, Dan E. Garvey, Secretary of State of Arizona, Maricopa County, John A. Foote, Ed Oglesby and Phil Isley, constituting the Board of Supervisors of Maricopa County, Arizona, move the court as follows:

1. For summary judgment that this court has no jurisdiction of this controversy because this action is one against the State of Arizona, without its consent, by a citizen of said state.

2. For summary judgment that this court has no jurisdiction of this controversy under its provisions of the Judicial Code of the United States.

3. For summary judgment that the provisions of the Act of Congress, June 20, 1910, Chapter 310, 61st Cong. alone, give plaintiff as a citizen of the State of Arizona no right to resort to the federal court to enforce the provisions of the trust created thereby.

4. For summary judgment as to the whole of the claim asserted by plaintiff, E. J. Jones. [66]

5. For summary judgment that no question of a violation of the provisions of the trust created by the Act of Congress, June 20, 1910, Chapter 310, 61st Cong. is presented by this complaint.

6. For summary judgment that this court is bound by the decisions of the Supreme Court of the State of Arizona in the cases of *Maricopa County v. Osborn, et al*, (1942), Ariz.; 125 Pac. (2d) 703, and the decision rendered by that court on April 12, 1943, in the subsequent case of *Maricopa County v. Osborn, et al*, Ariz., 136 Pac. (2d) 270, holding that the Maricopa County Highway Bonds herein the subject of litigation are redeemable and refundable prior to their respective maturity dates, as provided by the laws of the State of Arizona.

7. For summary judgment that the Maricopa County Highway Bonds herein the subject of litigation be adjudged to be redeemable and refundable prior to their respective maturity dates by the Loan Commissioners of the State of Arizona.

8. For summary judgment that upon the giving of notice for call and redemption of the outstanding Maricopa County Highway Bonds as prescribed by the statutes of the State of Arizona, Maricopa County will cease to remain liable to all holders of Maricopa County Highway Bonds for payment of interest on said bonds accruing thereafter.

9. For summary judgment that defendants' action in refunding said outstanding Maricopa County Highway Bonds will infringe none of plaintiff's rights under the Constitution of the United States.

10. For summary judgment that defendants have and recover their costs of suit herein incurred. [67]

Dated this 22nd day of May, 1943.

JOE CONWAY

Attorney General

EARL ANDERSON

Chief Assistant Attorney General

Attorneys for Defendants who
are officials of the State of
Arizona

HAROLD R. SCOVILLE

Maricopa County Attorney

LESLIE C. HARDY

Special Counsel for Maricopa County
Attorneys for Defendants Maricopa
County and the officials of Mari-
copa County, Arizona.

[Endorsed]: Filed May 22, 1943. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Gwen. Roby, Deputy Clerk. [68]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT UNDER RULE 56

State of Arizona,
County of Maricopa—ss.

Leslie C. Hardy, first being duly sworn, deposes and says:

1. That he was at all times mentioned herein, and he is now, an attorney engaged in the practice

of law in the Courts of the State of Arizona, and that he is authorized to appear herein in association with the County Attorney of Maricopa County, and was also authorized to appear as special counsel for Maricopa County, as plaintiff in an original action in mandamus brought before the Supreme Court of the State of Arizona on March 4, 1943, entitled: "Maricopa County, a body politic and corporate vs. Sidney P. Osborn, Governor of the State of Arizona, Ana Frohmiller, State Auditor of the State of Arizona; and J. D. Brush, State Treasurer of the State of Arizona, constituting the Loan [69] Commissioners of the State of Arizona, No. 4606", and that although pending at the time of the filing of the complaint herein before this court, said action in mandamus was decided by the Supreme Court of the State of Arizona on April 12, 1943.

2. That in his capacity as special counsel affiant became and is now personally familiar with the facts surrounding the indebtedness of the said Maricopa County in the principal amount of \$4,100,000 of Maricopa County Highway Bonds.

3. That defendant, Maricopa County, heretofore, to-wit: under date of June 15, 1919, pursuant to the laws of the State of Arizona, duly authorized and issued *and issued* \$4,000,000 principal amount of Highway Bonds, bearing interest at the rate of 5½% per annum, payable semi-annually, maturing over a period of 20 years beginning June 15, 1930, of which issue there were on or about July 7, 1941, outstanding and unpaid bonds in the principal

amount of \$2,100,000, whereof there are now outstanding and unpaid as of the date hereof \$1,700,000 principal amount of said bonds, being bonds numbered 2301 to 4000, both inclusive, which mature and become payable in serial amounts on June 15th in each of the years 1944 to 1949, both inclusive. That of said issue there is also outstanding and unpaid \$200,000 principal amount of bonds maturing June 15, 1943.

4. That defendant, Maricopa County, heretofore, to-wit, under date of January 15, 1921, pursuant to the laws of the State of Arizona, duly authorized and issued \$4,500,000 principal amount of Highway Bonds, bearing interest at the rate of 6% per annum, payable semi-annually, maturing over a period of 20 years beginning January 15, 1931, of which issue there were on or about July 7, 1941, outstanding and unpaid bonds in the principal amount of \$2,800,000, whereof there are now outstanding and unpaid as of the date hereof \$2,400,000 principal amount of said bonds, being bonds [70] numbered 6101 to 8500, both inclusive, which mature and become payable in serial amounts on January 15th in each of the years 1944 to 1951, both inclusive.

5. That on July 7, 1941, the Board of Supervisors of Maricopa County passed and adopted a resolution officially demanding that the Loan Commissioners of the State of Arizona redeem and refund said issued and outstanding Highway Bonds of Maricopa County in the aggregate principal amount of \$4,900,000, which aggregate principal

amount was outstanding as of said July 7, 1941, and by such resolution the Board of Supervisors of Maricopa County found and recited that the redeeming and refunding of such outstanding indebtedness would be for the profit and benefit of Maricopa County.

6. That on November 7, 1941, said Loan Commissioners informed the Board of Supervisors of Maricopa County, in writing, that they were unauthorized to refund said outstanding indebtedness of Maricopa County as demanded by Maricopa County, as aforesaid, and said Loan Commissioners did thereupon refuse to redeem and refund said outstanding Highway Bonds of Maricopa County or to provide for the refunding thereof, and thereupon, to-wit, on February 2, 1942, Maricopa County filed an original action in mandamus in the Supreme Court of the State of Arizona, which proceedings were entitled as hereinbefore set forth in paragraph 1, to command said Loan Commissioners to redeem and refund said outstanding indebtedness of Maricopa County notwithstanding the refusal of said Loan Commissioners to do so.

7. That said original action filed in the Supreme Court of the State of Arizona, as aforesaid, duly came on for hearing and decision, and on May 4, 1942, said Court rendered and entered its judgment making peremptory the alternative writ of mandamus [71] which had theretofore issued in said action, and by said peremptory writ of mandamus said Loan Commissioners were commanded to re-

deem said outstanding indebtedness of Maricopa County; that on September 16, 1942, said Supreme Court of the State of Arizona, reaffirmed its judgment by denial of a petition for rehearing filed by defendants in said original action for mandamus.

8. That in said decision, the Supreme Court of the State of Arizona held and determined that the statutes of the State of Arizona, being Chapter I, Title 52, Arizona Revised Statutes of 1913, were in full force and effect on the dates of June 15, 1919, and January 15, 1921, being respectively the dates of issuance of Maricopa County Highway Bonds, and that said statutes entered into and became a part of said Maricopa County Highway Bonds; that Chapter I, Title 52, Arizona Revised Statutes of 1913, authorized the call and redemption and refunding of said bonds prior to their respective maturity dates; that the calling of outstanding Maricopa County Highway Bonds for the redemption and refunding prior to their respective maturity dates was a legal and valid power conferred upon the Loan Commissioners of the State of Arizona by the provisions of Chapter I, Title 52, Arizona Revised Statutes of 1913, and that it became the duty of said Loan Commissioners to call said bonds for redemption and refunding upon official demand of the County of Maricopa. That in view of the foregoing decision, the alternative writ of mandamus issued therein was made peremptory.

9. That in said original proceedings in mandamus brought in the Supreme Court of the State of

Arizona by the County of Maricopa on February 2, 1942, plaintiffs' attorneys herein, being Messrs. Gust, Rosenfeld, Divelbess, Robinette & Coolidge, appeared therein and were authorized and permitted to [72] appear therein by order of said Supreme Court duly made and entered. That said proceeding was thereafter duly heard by the Supreme Court of the State of Arizona and that, as affiant is informed and believes, plaintiffs herein and all other holders and owners of the bonds of said Maricopa County described in said complaint were and became parties to said proceeding as a class and were represented in said proceeding by their attorneys Messrs. Gust, Rosenfeld, Divelbess, Robinette & Coolidge, and/or by their attorneys Messrs. Pershing, Bosworth, Dick & Dawson of Denver, Colorado, and/or by Messrs. Cox and Cox and Herbert Watson of Phoenix, Arizona. That said Attorneys for plaintiffs herein made the same contention before the Supreme Court of Arizona as is now made by them before this Court to the effect that the Loan Commissioners of the State of Arizona had no authority under the laws of the State of Arizona to redeem outstanding Maricopa County Highway Bonds prior to their fixed maturity dates. That in said proceedings said attorneys who now represent the plaintiffs in this action had fully considered and determined against them all arguments to the effect that said bonds were not redeemable prior to their respective maturity dates and refundable by the issuance of State of Arizona Refunding Bonds.

That the brief of plaintiff's attorneys filed in said action, a copy of which is annexed hereto and marked "Exhibit C," and which is hereby referred to and by reference incorporated herein and made a part hereof, reads in part on pages 6-7, and 17-18 as follows:

"Proposition number 1 stated above, to the effect that the bonds of Maricopa County which said county desires to refund, were issued with a definite maturity date without provisions for calling before maturity in exact compliance with Chapter 2, Title 52, Civil Code 1913, is clear from an examination of Sections 5266 [73] to Section 5281, both inclusive. Said sections provide a complete procedure for authorization by the electors, the issuance, payment and retirement of county, school district and municipal bonds. No aid from Chapter 1 of said Title 52 is required to provide for such authorization, issuance, payment or retirement of said bonds. Section 5273 expressly requires that the call for the elections shall set forth among other things the term of the bonds and the date of maturity of the bonds. Section 5274 says that the bonds shall be payable at a date not to exceed forty years from the date of their issuance. Section 5279 provides that the tax to be levied shall provide a fund for the redemption of the bonds when they mature and section 5281 provides that when the bonds shall mature it shall be the duty of the county or city or town treas-

urer, as the case may be, to give notice for four weeks in some newspaper, of the intention to redeem such bonds, and for the application of money on hand to such redemption. Clearly the provisions of these sections authorize the officials of the counties and municipalities, when so directed by the electors at an election, to make bonds payable at a definite maturity date without provision for prior call and when they have so issued bonds a contract has been entered into by the purchasers of these bonds with the county or municipality that cannot be set aside at a later date by either party because the exigencies of finance make it profitable to escape from the contract. * * *."

* * * * *

"Proposition number 5, above stated, to the effect that the provisions of 5273 providing a date of maturity for bonds to be stated in the call for election and provisions of Section 5279 providing for the levy of a tax to pay said bonds until they mature, and the provisions of Section 5281 providing for the retirement of such bonds after maturity, cannot be held to have been repealed by the provisions for refunding and the provisions reserving the right to call bonds contained in Sections 5252 and 5253, Chapter 1 of said Title 52, is very clear for several reasons. In the first place as has been pointed out, the provisions in Chapter 2 refer to an entirely different kind of bond than do the provisions in Chapter 1.

“In the second place, no express repeal being made, an implied repeal will not be presumed unless the two provisions cannot stand together. * * *.” [74]

10. That pursuant to said peremptory writ of mandamus issued from the Supreme Court of the State of Arizona, said Loan Commissioners duly passed and adopted a resolution authorizing the issuance of refunding bonds of the State of Arizona for the purpose of redeeming said Maricopa County Highway Bonds then outstanding. That through proceedings duly and regularly taken under the laws of the State of Arizona, due notice was given and bids were called for by the said Loan Commissioners for the purchase of refunding bonds of the State of Arizona in the principal amount of \$4,100,000. That said Loan Commissioners, to-wit, on February 10, 1943, accepted by resolution incorporated in the Minutes of a Meeting of the Loan Commissioners of the State of Arizona, annexed hereto, marked “Exhibit B”, the joint bid of, and awarded the purchase of said refunding bonds to, Bank of America National Trust and Savings Association, Boettcher and Company, and R. H. Moulton & Company. That notwithstanding said award and sale of said State of Arizona Refunding Bonds, said Loan Commissioners, on February 12, 1943, advised the Board of Supervisors of Maricopa County, in writing, as such Loan Commissioners, that they would not execute or deliver any of said refunding

bonds to said purchasers and said Loan Commissioners refused to execute or deliver any of said State of Arizona Refunding Bonds to said purchasers. That thereupon the County of Maricopa, as plaintiff, on March 4, 1943, brought a second original action in mandamus in the Supreme Court of the State of Arizona to compel said Loan Commissioners to call and redeem said outstanding bonds of the County of Maricopa and issue therefor refunding bonds of the State of Arizona as demanded by the Board of Supervisors of Maricopa County by official resolution under date of July 7, 1941.

[75]

11. That said second original action filed in the Supreme Court of the State of Arizona, as aforesaid was entitled "Maricopa County vs. Osborn, et al," and was decided on April 12, 1943, and is reported in 136 Pac. (2d) 270, (Adv. Sheet May 14, 1943, Vol. 1, p. 270), wherein said court rendered and entered its judgment making peremptory the alternative writ of mandamus which had theretofore issued in said action; and by said peremptory writ of mandamus said Loan Commissioners were directed and commanded to execute and deliver \$4,100,000 refunding bonds of the State of Arizona for the purpose of redeeming a like amount of outstanding Maricopa County Highway Bonds.

12. That in said opinion, said Supreme Court of the State of Arizona reaffirmed its former decision in the case of Maricopa County vs. Osborn (1942), Ariz.; 125 Pac. (2d) 703, and held and

determined that outstanding Maricopa County Highway Bonds in the principal amount of \$4,100,000 were redeemable prior to their respective maturity dates under the provisions of Chapter I, Title 52, Arizona Revised Statutes of 1913, and were refundable by the issuance of State of Arizona Refunding Bonds.

13. That said judgment of the Supreme Court of the State of Arizona rendered and entered April 12, 1942, adjudicates in every material respect, both as to substance and procedure, the right of Maricopa County under the Constitution and statutes of the State of Arizona to redeem and refund \$4,100,000 principal amount of outstanding Maricopa County Highway Bonds herein the subject of litigation.

14. That said judgments of the Supreme Court of the State of Arizona finally determining the law of the State of Arizona in respect of the right of Maricopa County to redeem its outstanding indebtedness are valid and binding on defendants as and constituting the Loan Commissioners of the State of Arizona. [76]

15. That there is no genuine triable issue of material fact herein; that the only issues herein involved are issues of law upon which defendants and all of them are entitled to judgment as prayed for.

16. That by virtue of the decision of the Supreme Court of the United States in the case of *Erie R. R. Co. vs. Tompkins* (1938), 304 U. S. 64,

58 S. Ct. 817, 82 L. Ed. 118, 114 A. L. R. 1487, these decisions of the Supreme Court of Arizona finally establishing the law of the State of Arizona are, as affiant verily believes, binding and conclusive on this court. That, accordingly, no federal question is involved in this proceeding and the law of the State of Arizona, which is binding upon this court, having been finally established by decisions of the Supreme Court of Arizona requires that judgment be entered in favor of defendants.

LESLIE C. HARDY

Subscribed and sworn to before me this 22nd day of May, 1943.

AGNES WESTRA

Notary Public

My Commission will expire:

July 2, 1943

[Seal] [77]

“EXHIBIT C”

In the Supreme Court of the
State of Arizona

No. 4489

MARICOPA COUNTY, a Municipal Corporation,
Plaintiff,

vs.

SIDNEY P. OSBORN, Governor of the State of
Arizona; ANA FROHMILLER, State Auditor
and JOE HUNT, State Treasurer, Constituting
the LOAN COMMISSIONERS OF THE
STATE OF ARIZONA,

Defendants.

BRIEF OF GUST, ROSENFELD, DIVELBESS,
ROBINETTE AND COOLIDGE, AS AMICI
CURIAE.

This brief is filed by the undersigned members of the bar of this court as amici curiae pursuant to an order of the court permitting the same to be filed. It is not our purpose to question generally the statement of facts made by the plaintiff in its brief, nor the correctness of the legal propositions advanced in that brief. We desire to call the attention of the court to what we believe to [78] be a fallacy underlying the theory of the plaintiff's case and the arguments advanced in support of that case.

This fallacy lies in the plaintiff's assuming that the retirement of county and municipal bonds, is-

sued under Chapter 2, Title 52, Civil Code of 1913, is governed by the provisions of Chapter 1 of said Title, rather than by the provisions of the chapter under which said bonds were issued. We believe that the following propositions will make clear to the court that this fallacy permeates plaintiff's theory of this case and that when said fallacy is corrected mandate cannot issue as prayed for:

1. The bonds the plaintiff Maricopa County desires to have refunded by the State Loan Commissioners in this case were issued with a definite maturity date, without provision for call before maturity, in exact compliance with Chapter 2, Title 52, Civil Code of 1913, which contains a complete procedure for the authorization, issuance, payment and retirement of county and other municipal bonds.

2. The provisions of Section 5252, contained in Chapter 1, Title 52 Civil Code of 1913, making it the duty of the State Loan Commissioners to issue new bonds for the purpose of paying, redeeming and refunding existing indebtedness when the same can be issued at a lower rate of interest than previously paid, do not apply to unmatured bonds, unless such bonds are subject to call or are voluntarily surrendered by the holders.

3. The provisions of Section 5253, Chapter 1, of Title 52, Civil Code of 1913, providing that the state reserves the right to redeem at par bonds in their numerical order fifteen years after the date thereof, apply only to bonds issued by the State Loan Commissioners for state indebtedness and do

not apply to bonds issued by counties or municipalities, under the provisions of Chapter 2 of Title 52, Civil Code of 1913.

4. The provision of Section 5260, in Chapter 1 of Title 52, Civil Code of 1913, authorizing the State Loan Commissioners on demand from the Board of Supervisors or municipal or school districts, to provide for the redeeming or refunding of county, municipal or school district indebtedness in the same manner as [80] other state indebtedness, refers only to the procedure for refunding and does not write into county and municipal bonds issued under Chapter 2, Title 52, Civil Code of 1913, the reservation of the right to redeem bonds issued by the Loan Commissioners reserved to the state by Section 5253 of Chapter 1, of said Title 52.

5. The provisions of Section 5273, Chapter 2, Title 52, Civil Code of 1913, providing a date of maturity for bonds to be stated in the call for the election and the provisions of Section 5279 in said Chapter 2, providing for the levy of a tax to pay said bonds until they mature and the provisions of Section 5281 in said Chapter, providing for the retirement of such bonds after maturity cannot be held to have been repealed by the provisions for refunding and the provisions reserving the right to call bonds contained in Sections 5252 and 5253 in Chapter 1 of said Title 52, (a) for the reason that they do not refer to the same kind of bonds, (b) such implied repeal is not presumed unless the two provisions cannot stand together, (c) Sections 5273

and 5279 and several other sections of Chapter 2 were enacted after Chapter 9, (d) Chapter 29 Laws [81] of 1912 First Special Session, being the original enactment of Chapter 1, Title 52, did not comply with the constitutional provision relating to amending acts and (e) the provisions of both chapters are preserved for operation in their respective fields by the code revisions of 1913 and 1928.

6. Admitting that it is the duty of the Loan Commissioners to proceed to refund county bonds on the request of the county under the provisions of Section 5260, Chapter 1, Title 52, Civil Code of 1913, the mandate in this case cannot be granted because Maricopa County does not show that it has any bonds to be refunded as the bonds in question are not yet due and are not subject to call before maturity.

7. Mandamus should not issue to require the Loan Commissioners to proceed under the provisions of Section 5260, Chapter 1, Civil Code of 1913, until Maricopa County has established its right to call the bonds in question by appropriate proceedings against the bondholders for until such right is established, there is no plain and clear duty on the part of the State Loan Commissioners to proceed.

ARGUMENT [82]

Proposition number 1 stated above, to the effect that the bonds of Maricopa County which said county desires to refund, were issued with a definite

maturity date without provisions for calling before maturity in exact compliance with Chapter 2, Title 52, Civil Code 1913, is clear from an examination of Sections 5266 to Section 5281, both inclusive, Said sections provide a complete procedure for authorization by the electors, the issuance, payment and retirement of county, school district and municipal bonds. No aid from Chapter 1 of said Title 52 is required to provide for such authorization, issuance, payment or retirement of said bonds. Section 5273 expressly requires that the call for the election shall set forth among other things the term of the bonds and the date of maturity of the bonds. Section 5274 says that the bonds shall be payable at a date not to exceed forty years from the date of their issuance. Section 5279 provides that the tax to be levied shall provide a fund for the redemption of the bonds when they mature and Section 5281 provides that when the bonds shall mature it shall be the duty of the county or city or town treasurer, [83] as the case may be, to give notice for four weeks in some newspaper, of the intention to redeem such bonds, and for the application of money on hand to such redemption. Clearly the provisions of these sections authorize the officials of the counties and municipalities, when so directed by the electors at an election, to make bonds payable at a definite maturity date without provision for prior call and when they have so issued bonds a contract has been entered into by the purchasers of these bonds with the county or municipality that

cannot be set aside at a later date by either party because the exigencies of finance make it profitable to escape from the contract. That such a contract may be desirable for the sellers of the bonds for the reason that they will bring a better price than if subject to call at any time is pointed out by the courts in the following cases:

Fales vs. Multnomah County, 248 Pac. 151, 153.

State vs. Kansas City, 204 Pac. 690, 691.

Mitchell vs. Knox County Fiscal Court, 177 S.W. 279, 286.

In the Fales case, *supra*, the court says: [84]

“Callable bonds, sometimes called redeemable or optional bonds, which kind of school bonds are provided for by section 5062, Or. L., being the Act of 1913, ‘redeemable at the pleasure of the (school) district but due and payable absolutely twenty years from date,’ are denominated term bonds, which may be called for payment before their maturity. This is in order that the issuing municipality may redeem its indebtedness if it chooses to exercise the option, without being obliged to do so. Very few of such bonds are called for payment before their maturity. They do not sell at the same price as they would for the term without the optional feature, since, for the purpose of computing the selling price or basis, the bond is treated as running only to the optional date and not to maturity.”

In the case of *State vs. Kansas City*, *supra*, the court says:

“* * * privilege of short-time prepayment operates in the sale of the bonds at a discount for one-half of 1 per cent; and, if the city must write into proposed bonds privilege of prepayment, the aggregate loss on bond issues for the year 1922 will be about \$25,000.”

In the *Mitchell* case, *supra*, the court says:

“It is well known that bonds which run for a specified long term, without being subject to redemption before their maturity bring a higher price than bonds that are subject to redemption before their maturity. On the other hand, it is to the interest of the county to have the right to redeem a long-term bond at any time before its maturity. Interest rates may fall, or the county may have funds on hand which it can conveniently apply to the payment of its debts. It is therefore usual, in bonds of this character, to make all or [85] some of them redeemable at some time before their maturity, and after they have run a reasonable length of time. This form tends to make them marketable, at a good price. Furthermore, the statute does not mean that the fiscal court must insert the redemption clause into all of its bonds, but merely that it has the power to do so, and that power involves the right to insert the redemption clause in some bonds, and omit it from others.”

Proposition number 2, the second proposition above stated, to the effect that the provisions of Section 5252 of Chapter 1, Title 52, Civil Code of 1913, making it the duty of the Loan Commissioners to issue new bonds for the purpose of paying, redeeming and refunding indebtedness when the same can be issued at a lower rate of interest to the profit and benefit of the state, does not authorize the call and retirement of bonds bearing a definite maturity date, without provision for call and retirement, is established by a comparison of the provisions of said Section 5252 with Section 5253 immediately following. Section 5253 was adopted by the same legislature as adopted Section 5252, but at a later session. If said Section 5252 is to be construed as authorizing the retirement of bonds at any time whenever the interest rate is such as to make it profitable for the debtor, then the provision in Section 5253, reserving [86] to the state the right to redeem bonds at par after fifteen years, in their numerical order, is not only wholly unnecessary but is positively misleading to the purchasers of the bonds. In view of said Section 5253, Section 5252 must be construed as limiting the right to redeem and refund bonds consistent with Section 5253, that is, giving the right to refund only when the bonds have matured or are callable under the fifteen year provision or are being voluntarily surrendered by the holders thereof. That such is the proper construction of these two sections taken together, is

clear from the case of *State ex rel. Board of Fund Commissioners vs. Smith*, 96 S.W. (2) 348.

The language to be construed in that case was the following:

“The board of fund commissioners are hereby authorized and empowered to enter into contracts, and to refund any part of the bonded indebtedness of the state, whenever they can do so to the advantage of the state in change of time, terms of payment or interest payment upon the indebtedness which it is proposed to refund,”

and the court in construing the same said the following:

“Or, stated differently, if section 11500 authorizes the calling and redemption of any and all outstanding bonds at any time advantage will thereby result to the state, [87] and that section is to be read into all bonds issued subsequent to the enactment of that section, then all such bonds must certainly be option bonds of the character described in section 11499 and the latter section rendered meaningless. No such intention will be charged to the Legislature by the courts if it can be avoided. The only possible construction which can be given section 11500 which will not render section 11499 nugatory is that the former section applies only to the refunding of nonoption bonds at their stated maturity or by contractual agreement, and to

the refunding of option bonds during the period of the option when advantage to the state will result. Such a construction is reasonable and in entire accord with the principle expressed by the General Assembly in the following introductory words of its Act of March 31, 1885; 'Whereas, the maintenance of the credit of the state is of the utmost importance and should ever be guarded with the most jealous care.' Laws 1885, p. 39.

"It is not only possible, but is very probable, that when the General Assembly authorized the fund commissioners to refund any part of the bonded indebtedness of the state, 'whenever they can do so,' etc., it was understood that bonds then outstanding, or which might thereafter be issued, containing the solemn promise of the state to pay interest at an agreed rate for a definite length of time, constituted such an insurmountable and clearly recognized obstacle to the changing of the contract without the agreement of both parties that it was not deemed necessary to incorporate the exception in the act.

"(3) The bonds herein involved, having a definite maturity date stated therein, containing the unqualified promise to pay interest at a stated rate for a definite length of time, and issued under constitutional authority containing as its only direction relative to maturity the words, 'and maturing not later than thirty-five

years from their date (section 44d, art. 4, Const. see Laws Mo. 1933-34, Ex. Sess., p. 174), are not option bonds and cannot [88] be refunded prior to maturity except by agreement. Since the bonds are not due and there is no agreement that they may be refunded, it necessarily follows that the Board of Fund Commissioners is without authority to issue refunding bonds for the purpose of refunding the present issue."

96 S.W. (2) 351.

Proposition number 3 above stated, to the effect that the provisions of Section 5253, Chapter 1 of Title 52, Arizona Civil Code of 1913, providing that the state reserves the right to redeem at par bonds in their numerical order fifteen years after date thereof, apply only to bonds issued by the State Loan Commissioners for state indebtedness and do not apply to bonds issued by the counties or municipalities, under the provisions of Chapter 2, Title 52, Civil Code 1913, is obvious. Sections 5251 and 5252 immediately preceding Section 5253 refer only to outstanding and existing indebtedness of the State of Arizona or the Territory of Arizona assumed by the state, and such state indebtedness as may be or is now authorized by law, and to subsisting state legal indebtedness, and the said Section 5253 refers to said bonds thereby clearly indicating Section 5253 applies to the bonds mentioned in the preceding two sections. Furthermore, a [89] comparison of the provisions of Section 5253 with Sec-

tion 5273 in Chapter 2 of said Title 52 shows that Section 5253 is not intended to apply to county and municipal bonds, for the maximum rate of interest permitted by Section 5253 is 5% while Section 5273 permits a maximum of 6% for county and municipal bonds, and a comparison of Section 5253 with Section 5274 shows that the maximum term for bonds issued under Section 5253 is 25 years, while the maximum term for county and municipal bonds is forty years. Furthermore, the bonds mentioned in Section 5253 must be signed by the Loan Commissioners, while the county and municipal bonds issued under Section 5274 must be signed and attested when issued by the county by the chairman and clerk of the board of supervisors, when issued by school districts by chairman and clerk of the board of school trustees and must be countersigned by the chairman of the board of supervisors of the county, and when issued by a city or town must be signed by the mayor and city clerk of such city or town. A comparison of Section 5253 with Section 5260 further discloses the fact that the faith and credit of the state is pledged for the [90] payment of the bonds and the interest accruing thereon as to bonds issued under Section 5253, but as to county and municipal bonds refunded by the Loan Commissioners pursuant to Section 5260 payment of the bonds is required from the funds of the county, municipality or school district, only. A comparison of Section 5253 with Section 5277 shows that the bonds referred to by Section 5253 must be registered by the State Auditor in a book to be kept

by him for that purpose, and the county and municipal bonds issued in pursuance of Chapter 2 of Title 52 must be entered upon the record of proceedings of the governing body of the school district, city or town, or other municipal corporation disposing of the same.

It being thus clear that most of the provisions in Section 5253 cannot pertain to county and municipal bonds issued under Chapter 2 of Title 52, it is, indeed, a far stretch to contend that the provision for reservation of the right of redemption must be imported into the county and municipal bonds issued under Chapter 2, but even that provision reserving the right to redeem is inconsistent with Section 5281 found in Chapter 2, for said [91] provision to redeem in Section 5253 reserves the right to redeem after fifteen years from date of issue and Section 5281 provides for redemption when the bonds shall mature, and under Section 5274 of Chapter 2 county and municipal bonds may mature at any time from one to forty years after their date of issuance.

Proposition number 4 to the effect that the provision in Section 5260, in Chapter 1 of Title 52 of the Civil Code, 1913, authorizing the State Loan Commissioners, on demand from the board of supervisors or the proper authorities of municipalities or school districts, to provide for the redeeming or refunding of county, municipal or school district indebtedness in the same manner as other state indebtedness, refers only to the procedure for re-

funding and does not write into county and municipal bonds issued under Chapter 2, Title 52, Civil Code, 1913, the reservation of the right to redeem bonds issued by the State Loan Commissioners, reserved to the state by section 5253 of Chapter 1 of said title 52, seems clear from the language used. Said section 5260 does not provide that counties, municipal- [92] ities and school districts shall reserve the right to redeem or refund their bonds at the same time or times that state bonds may be redeemed or refunded, but provides only that the "Loan Commissioners shall provide for the redeeming or refunding of the county, municipal and school district indebtedness upon the official demand of said authorities in the same manner as other state indebtedness and they shall issue bonds for any indebtedness now allowed or that may be hereafter allowed by law to said counties, municipalities or school districts upon official demand of said authorities." This language is not capable of being construed as making county and municipal bonds redeemable or callable at the time provided by Section 5253 for state bonds. It is well settled by the authorities that the phrase "In the same manner" is not applicable to substance but only to procedure and is the equivalent of saying by "similar proceedings so far as * * * applicable to the subject matter," *Commonwealth vs. Hildebrand*, 11 Atl. (2) 688. In this case the court said:

"The phrase 'in the same manner', however, has a well-understood meaning in statutory con-

struction and its restrictive or limiting [93] force applies not to substance, but to procedure only; it is the equivalent of saying 'by similar proceedings, so far as * * * applicable to the subject-matter.' Wilder's S. S. Co. v. Low, 9 Cir., 112 F. 161, 164, Durosseau v. United States, 6 Cranch 307, 317, 3 L. Ed. 232. If the legislature had intended that appeals under both sects. 404 and 410 should not only be held in the same manner, but should be subject to the same limitations of appellate review, it is probable that the legislature would have so indicated."

Proposition number 5, above stated, to the effect that the provisions of 5273 providing a date of maturity for bonds to be stated in the call for election and provisions of Section 5279 providing for the levy of a tax to pay said bonds until they mature, and the provisions of Section 5281 providing for the retirement of such bonds after maturity, cannot be held to have been repealed by the provisions for refunding and the provisions reserving the right to call bonds contained in Sections 5252 and 5253, Chapter 1 of said Title 52, is very clear for several reasons. In the first place as has been pointed out, the provisions in Chapter 2 refer to an entirely different kind of bond than do the provisions in Chapter 1.

In the second place, no express repeal being made, an implied repeal will not be pre- [94] sumed unless

the two provisions cannot stand together. *Southern Pacific Company v. Gila County*, 109 Pac.(2) 610, in which case this court quotes the rule laid down in its former decisions, as follows:

“It should also be borne in mind that repeals by implication are not favored and will not be indulged if there is any other reasonable construction.”

Furthermore, while the main portion of Chapter 2, Title 52, Civil Code 1913, first originated in Chapter 29 Session Laws 1912, Regular Session, and the main provisions of Chapter 1, Title 52, Civil Code of 1913, first originated in Chapter 29 of Session Laws of 1912, First Special Session, yet some of the provisions in said Chapter 2 were first enacted by Chapter 22, Session Laws of 1913, Third Special Session, so it is hard to say which of the two chapters is the later enactment. Be that as it may, the later act did not comply with the constitutional provision for amending the prior act and, hence, ought not to be construed as having the effect of amending the prior act, if that can be avoided. *State vs. Kansas City*, 204 Pac. 690, 691. Lastly, the provisions of all of the original acts were inserted in the revisions of 1913 and 1928 [95] and by reason of such insertion in such revisions both chapters must be given effect as far as possible on the presumption that the legislature intended that each should be preserved to operate in its particular field.

Sou. Pac. R. R. Co. v. Gila County, 109 Pac. (2) 610, 611.

Proposition number 6 stated above, to the effect that while it is the duty of the Loan Commissioners to proceed to refund county bonds on the request of the county under the provisions of Section 5260, Chapter 1, Title 52, Civil code of 1913, the mandate cannot issue in this case because Maricopa County does not show that it has any bonds to be refunded as the bonds in question are not yet due and are not subject to call before maturity, necessarily follows from what has been stated above under the five preceding propositions. It is obvious from the present rate of interest on municipal bonds and from the allegations of the plaintiff's complaint that the holders of the bonds in question will not voluntarily surrender them at the present time and if the views we have above expressed are correct, said bonds are not callable or redeemable until their respective dates of maturity, as [96] such dates were approved by the electors at the election and as they were definitely fixed in the bonds in pursuance of Chapter 2, Title 52, Civil Code of 1913, under which they purport to be issued, and were in fact issued. If we are right in our construction of the statutes involved, Maricopa County has no more right to compel the holders of these bonds to accept present payment merely because the county can save money by doing so than the bondholders had the right a few years ago when the county was delinquent in its payments, to compel the county to issue longer term bonds at a lower rate of interest as the bondholders then thought

for their best interest. Maricopa County then saw fit to stand on its contract as it was written and we believe the bondholders likewise have the right to stand on the same contract.

Proposition number 7, to the effect that mandamus should not issue to require the Loan Commissioners to proceed under the provisions of Section 5260, Chapter 1, Civil Code of 1913, until Maricopa County has established its right to call the bonds in question by appropriate proceedings against the bondholders, [97] seems obviously a correct statement of law relating to mandamus. The rule repeatedly stated by this court and other courts is unqualifiedly to the effect that mandamus will not issue to compel a public officer to perform an act unless it is his clear duty to do so. *Miners & Merchants Bank vs. Herron*, 46 Ariz. 71, 80; 34 American Jurisprudence Sec. 36, p. 831. If the peremptory writ should issue the Loan Commissioners would be obliged to proceed to issue the refunding bonds. The bondholders, not being bound by this proceeding, would naturally refuse to exchange their bonds and would unquestionably resort to the courts, State or Federal, to establish their contention. Assuming that this court would consider itself bound by a decision made in this case in which most of the bondholders, except the one that we represent, will have had no opportunity for a hearing, the Federal courts, of course, will not consider themselves so bound and the rule of *Erie v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, not applying by

reason of a right under the Federal Constitution being involved, the Federal courts will be obliged [98] to construe the statutory provisions in question independently of any determination made by this court. *Jackson County vs. United States*, 308 U. S. 343, 84 L. Ed. 313, 316. The result will be that the Loan Commissioners will have been forced into a long period of litigation by the mandate of this court. We do not believe that this court has the power to issue the writ under those circumstances.

If Maricopa County desires to refund these bonds, there is no obstacle under the provisions of the declaratory judgment act and rules 18a and 23a (Secs. 21-507, 21-524 Ann. Code 1939) of the rules of civil procedure to its bringing an appropriate proceeding against the bondholders to determine their rights under the bonds, which they hold and if it shall be determined in such proceeding that the bonds in question are callable, we do not believe a mandate against the Loan Commissioners will be necessary.

Respectfully submitted,

GUST, ROSENFELD, DIVEL-
BESS, ROBINETTE AND
COOLIDGE,

201 Professional Building,
Phoenix, Arizona,

By J. L. GUST [99]

“EXHIBIT B”

MINUTES OF A MEETING OF THE LOAN
COMMISSIONERS OF THE STATE OF
ARIZONA.

A meeting of the Loan Commissioners of the State of Arizona was held pursuant to the foregoing consent to said meeting in the office of the Governor of the State of Arizona, at the Capitol Building, in the City of Phoenix, within the said State of Arizona, at 3:00 o'clock P. M. on the 10th day of February, 1943.

The following, constituting all the members of the Loan Commissioners of the State of Arizona, were present:

Sidney P. Osborn, Governor

Ana Frohmiller, State Auditor

J. D. Brush, State Treasurer

The Governor announced that the Loan Commissioners were convened in meeting for the purpose of considering the bid of Bank of America National Trust & Savings Association, Boettcher and Company and R. N. Moulton & Company, which was filed and submitted to the Loan Commissioners of the State of Arizona by said bidders on February 1, 1943, whereby said bidders bid for \$4,100,000 refunding bonds of the State of Arizona as described and offered for sale in that certain call for bids authorized by the Loan Commissioners of the State of Arizona pursuant to a resolution adopted on November 19, 1942.

Following the discussion and consideration of said bid of Bank of America National Trust & Savings Association, Boettcher and Company and R. N. Moulton & Company, [100] Commissioner Brush offered and moved the adoption of the following resolution:

“RESOLUTION OF THE LOAN COMMISSIONERS OF THE STATE OF ARIZONA SELLING \$4,100,000 PRINCIPAL AMOUNT OF REFUNDING BONDS TO BE ISSUED FOR THE PURPOSE OF REDEEMING A LIKE PRINCIPAL AMOUNT OF BONDS OF MARICOPA COUNTY, ARIZONA; PROVIDING FOR THE REDEMPTION OF OUTSTANDING BONDS OF MARICOPA COUNTY AGGREGATING THE PRINCIPAL AMOUNT OF \$4,100,000; SETTING ASIDE THE PROCEEDS OF THE SALE OF STATE OF ARIZONA REFUNDING BONDS FOR THE PURPOSE OF REDEEMING SAID BONDS OF MARICOPA COUNTY AND DIRECTING NOTICE OF SUCH REDEMPTION TO BE GIVEN.

Whereas, the Loan Commissioners of the State of Arizona, heretofore, to-wit, on November 19, 1942, authorized the issuance of \$4,100,000 principal amount State of Arizona Refunding Bonds and directed notice of sale thereof to be given; and

Whereas, such notice of the sale of said Refunding Bonds has been duly given and published and at the time and place fixed for the receipt of bids, the Loan Commissioners duly met to consider all bids received for the purchase of said bonds and to take such action thereon as might be deemed advisable; and

Whereas, Bank of America National Trust & Savings Association, Boettcher and Company, and R. N. Moulton and Company, duly filed their bid for the purchase of said bonds at the price of par and a premium accompanied by a cashier's check on the First National Bank of Arizona, which is a member bank of the Federal Reserve System, [101] payable to the Treasurer of the State of Arizona in the sum of \$205,000; and

Whereas, said bid for the purchase of said bonds and the bidders' good faith check accompanying the same are satisfactory and in accordance with law and the Board of Supervisors of Maricopa County has, by resolution determined that said bid is satisfactory and should be accepted; and

Whereas, it appears that said bid should be accepted and said bonds awarded as in this resolution provided;

Now, Therefore, Be It Resolved by the Loan Commissioners of the State of Arizona, as follows:

Section 1. Refunding Bonds of the State of Arizona in the aggregate principal amount of \$4,100,000 are hereby awarded and sold to Bank of America National Trust & Savings Association, Boettcher and Company, and R. N. Moulton and Company in accordance with and subject to the terms and conditions of their said bid as follows, to-wit:

‘February 1, 1943

‘Loan Commissioners of the
State of Arizona
Phoenix, Arizona

Gentlemen:

For all, but not less than all of \$4,100,000.00 par value legally issued State of Arizona Refunding Bonds to be dated as of the date of their issuance, [102] to bear interest at the rate of $2\frac{3}{4}$ per cent per annum, payable semiannually January 15 and July 15, of the denomination of \$1,000.00 each, numbered from 1 to 4100, both inclusive, and maturing \$300,000.00 principal amount on July 15 in each of the years 1944 to 1956, both inclusive, and \$200,000.00 on July 15, 1957, all in accordance with your published notice of sale, we bid you the sum of par and accrued interest to date of delivery, together with a premium of \$800.00. We further agree as part of the purchase price that we will waive interest on the Refunding Bonds from the

date of their issue to April 15, 1943, this concession on our part being made for the purpose of enabling you to complete the proceedings for the call and redemption of the outstanding bonds of Maricopa County to the end that double interest will not accrue on both the Refunding Bonds and the outstanding Maricopa County bonds. This bid is subject to the following conditions, each of which is hereby made a condition precedent to any liability on our part.

(1) That this bid shall be accepted promptly, and notice thereof given to us, in no event later than 5:00 o'clock P. M., Pacific War Time, February 10, 1943.

(2) That said Refunding Bonds shall be duly executed and delivered to us on payment of the purchase price therefor not later than 12:00 o'clock Noon, Pacific War Time, March 15, 1943.

(3) That in the event that prior to the delivery of said Refunding Bonds to us the income received by private holders from bonds of the same type and character shall be taxable or subjected to tax or be declared to be taxable by the terms of any Federal Income Tax law either by ruling of the Bureau of Internal Revenue or by decision of any Federal Court or by amendment of the Federal Income Tax laws or otherwise, we may at our election be relieved of our

obligations under this agreement to purchase said bonds.

(4) The Loan Commissioners of the State of Arizona and the Board of Supervisors of Maricopa County, State of Arizona, will adopt such proceedings and take such action [103] as may legally be required for the purpose of calling and redeeming the outstanding \$4,100,000.00 principal amount of bonds of the County of Maricopa proposed to be refunded from the proceeds of the issuance and sale of said Refunding Bonds of the State of Arizona and that such outstanding bonds of the County of Maricopa to the amount aforesaid will be called and redeemed from the proceeds of the sale of said Refunding Bonds (which shall be used for no other purpose) and that interest on said bonds of the County of Maricopa will cease from and after the date fixed for such redemption.

(5) That you will furnish us with a full, true and correct transcript of the proceedings for the issuance of said Refunding Bonds duly certified on the basis of which we will be able to secure at our own expense, at or before the delivery of said Refunding Bonds to us, the unqualified legal opinion of Messrs. Orrick, Dahlquist, Neff & Herrington of San Francisco approving the legality of the proceedings for the issuance of said Refunding Bonds and the proceedings taken or to be

taken for the call and redemption of a like principal amount of outstanding bonds of Maricopa County, State of Arizona, in all respects. If our said attorneys are unable to render their opinion approving the legality of said Refunding Bonds and said proceedings for the redemption of said outstanding bonds of Maricopa County in all respects, this bid is to be deemed cancelled and we are to be relieved from all liability hereunder, with like force and effect as though this bid had not been made.

We hand you herewith cashiers check of the First National Bank of Arizona, which is a member bank of the Federal Reserve System, in the sum of \$205,000.00 payable to the order of the State Treasurer of the State of Arizona, to be held in accordance with your advertised notice of the sale of said bonds, but to be returned to us uncashed in the event you are unable to comply with each and all of the conditions precedent [104] above specified.

Very truly yours,

BANK OF AMERICA
NATIONAL TRUST & SAV-
INGS ASSOCIATION
BOETTCHER AND COMPANY
R. N. MOULTON AND
COMPANY

By FRANCES MOULTON'

Section 2. This award and the sale of said Refunding Bonds is made subject to the following conditions to which said successful bidders have consented and agreed, to-wit:

The Loan Commissioners shall have the right to deliver said Refunding Bonds to said bidders subsequent to March 15, 1943, if it proves to be impracticable to print, lithograph or execute said bonds prior to said date, or to make delivery thereof prior to said date by reason of litigation or any other cause whatsoever, and any delivery of said bonds made subsequent to said date shall constitute good delivery thereof in accordance with said notice of sale, provided all other terms and conditions of said bid shall have been duly complied with.

Said purchasers shall have the right upon five days written notice to the Loan Commissioners to terminate said extended period of delivery and require that delivery of said bonds be made to them not later than five days from the date of said notice. If such delivery of said bonds is not so made to said purchasers by the State Treasurer or the Loan Commissioners within the [105] said period of five days from the date of said notice, this sale shall be deemed cancelled and both the Loan Commissioners and said purchasers shall be relieved of all obligations one to the other. The Loan Commissioners shall be under no liability for damages for failure to deliver said bonds to said purchasers

in the event of cancellation of this sale nor shall said purchasers be under any liability to the Loan Commissioners or the State of Arizona. In the event of such cancellation of this sale the good faith check of \$205,000 deposited by said bidders shall be promptly returned to said bidders.

Section 3. Forthwith upon the payment into the state treasury of the proceeds of the sale of said \$4,100,000 principal amount of State of Arizona Refunding Bonds, the state treasurer shall apportion them to a special fund which is hereby designated the 'Maricopa County Highway Bond Redemption Fund.' Out of the moneys in said Maricopa County Highway Bond Redemption Fund the state treasurer shall pay a like principal amount of \$4,100,000 of bonds of Maricopa County designated and referred to in the resolution of the Loan Commissioners adopted November 19, 1942, which is hereby referred to and by reference incorporated herein and made a part hereof. [106]

Section 4. The Board of Supervisors of Maricopa County and the county treasurer thereof shall cause to be deposited with the state treasurer in a special fund which is hereby designated the 'Maricopa County Highway Bond Interest Fund,' the amounts necessary to pay interest on the bonds of Maricopa County called for redemption, from the last interest payment date to the date of redemption.

The moneys in said Maricopa County Highway Bond Interest Fund shall be used and applied by the state treasurer for the payment of interest from the last ensuing interest payment date to the date of redemption of said Maricopa County bonds.

Section 5. Forthwith upon the deposit of said proceeds of sale of said State of Arizona Refunding Bonds in said Maricopa County Highway Bond Redemption Fund and said interest moneys in said Maricopa County Highway Bond Interest Fund, it is hereby found and determined that there will be in the state treasury of the State of Arizona a sum sufficient for the redeeming of said outstanding bonds of Maricopa County, State of Arizona, for the redemption of which said State of Arizona refunding bonds are authorized to be issued.

Section 6. Upon the deposit of the funds as provided in Section 5 hereof, the state [107] treasurer of the State of Arizona is hereby authorized and directed to call for redemption and to redeem all of the outstanding bonds of Maricopa County more particularly described in the Notice of Redemption hereinafter set forth. The state treasurer shall cause notice of such call for redemption to be published at least two (2) consecutive times in the 'Arizona Weekly Gazette,' a newspaper published in the City of Phoenix, the state capitol of the State

of Arizona, and in addition thereto said state treasurer shall cause said notice to be published once a week for one (1) month in three (3) newspapers published in the State of Arizona (no two of which shall be published in the same county), and such notice shall be published in the 'Chandler Arizonan,' a newspaper published and circulated in the County of Maricopa, State of Arizona, and in the 'Nogales International,' a newspaper published and circulated in the County of Santa Cruz, State of Arizona, and in the 'Casa Grande Dispatch,' a newspaper published and circulated in the County of Pinal, State of Arizona. In addition to such publications in the State of Arizona, which are hereby declared to be sufficient and to constitute adequate public notice of such call for redemption, the state treasurer is hereby authorized to [108] cause such Notice of Redemption to be published once in 'The Bond Buyer,' a publication in the City and State of New York and of general circulation throughout the United States of America among dealers in municipal bonds and institutions and individual investors holding municipal bonds, and, also, to cause such Notice of Redemption to be published once in the 'Wall Street Journal, Pacific Coast Edition,' a newspaper published in the City and County of San Francisco, State of California, and of general circulation throughout the Pacific Coast of the

United States among municipal bond dealers, investors and institutional holders of municipal bonds; but no error or informality in such publication in said newspapers published in New York and San Francisco, respectively, or failure of publication in either or both thereof, shall affect the validity of such call for redemption, provided that notice thereof be published in said newspapers in the State of Arizona for the periods above specified. Said state treasurer is further authorized to cause a copy of such advertised Notice of Redemption to be mailed to Bankers Trust Company of the City of New York, State of New York, and to each bank or trust company or paying agent at which the interest on said bonds of Maricopa County hereby called for redemption was made payable.

Section 7. Said notice of call for redemption shall be substantially in the following form: [109]

NOTICE OF REDEMPTION
MARICOPA COUNTY STATE OF
ARIZONA HIGHWAY
BONDS

Notice Is Hereby Given, that pursuant to law and the proceedings of the Board of Supervisors of Maricopa County and the Loan Commissioners of the State of Arizona, all of the following described bonds of Maricopa County, State of Arizona are

hereby called for redemption and will be paid on, 1943, to-wit:

<u>Name of Bond</u>	<u>Date of Issue</u>	<u>Bond Numbers</u> (all inclusive)
Maricopa County Highway Bonds	June 15, 1919	2301 to 4000
Maricopa County Highway Bonds	January 15, 1921	6101 to 8500

Said bonds will be redeemed at the face amount thereof and accrued interest thereon to and including, 1943. Said bonds hereby called for redemption must be surrendered on said redemption date (with all interest coupons maturing subsequent to said redemption date) at the office of the state treasurer of the State of Arizona, Capitol Building, Phoenix, Arizona, for payment and cancellation. If any of said bonds hereinabove numbered and described are not presented for payment and cancellation thirty (30) days after the first publication of this notice, to-wit, on or [110] before, 1943, interest on all such bonds shall cease from and after said date.

This notice is given pursuant to proceedings of the Loan Commissioners of the State of Arizona and the concurrent action of the Board of Supervisors of Maricopa County, State of Arizona, adopting and ratifying the same.

Dated, Phoenix, Arizona,, 1943.

.....
State Treasurer of the State
of Arizona

.....
County Treasurer of Maricopa
County, State of Arizona

Section 8. If the state treasurer has knowledge of the names and addresses of the holders of any of said bonds hereby called for redemption, said state treasurer is further authorized and directed to deposit in the United States Post Office at Phoenix, Arizona, a copy of the foregoing notice of call for redemption, enclosed in a sealed envelope with postage thereon prepaid, addressed respectively to such owner or owners whose names and addresses are known to said state treasurer, each of which notices shall be mailed, as above provided, by depositing the same in the United States Post Office at least thirty (30) days prior to said last mentioned redemption date. [111]

Section 9. Whenever such outstanding bonds of Maricopa County hereby called for redemption are presented for payment, the state auditor shall endorse on each bond the amount due thereon and shall write across the face of each bond the date of its surrender and the name of the person surrendering the same and shall keep proper record thereof, and when the state

treasurer pays any of said bonds of Maricopa County so called for redemption, he shall cancel such bonds by perforating the same and indorsing thereon by writing or stamping in ink the words 'Redeemed and Cancelled', with the date of cancellation, and shall thereupon cause said bonds so cancelled to be delivered to the county treasurer of Maricopa County, who shall give his receipt therefor, and such receipt shall be full acquittance to the state treasurer and the state auditor of the State of Arizona for the application of the moneys in the Redemption Fund hereinabove specified, used and applied for the purpose of redeeming said bonds of Maricopa County.

Section 10. This resolution shall take effect immediately.

Passed and Adopted by the Loan Commissioners of the State of Arizona, on this 10th [112] day of February, 1943.

SIDNEY P. OSBORN

Governor

ANA FROHMILLER

State Auditor

J. D. BRUSH

State Treasurer

Loan Commissioners of the
State of Arizona."

* * * *

The foregoing motion was seconded by Commissioner Frohmiller, whereupon the motion was

adopted by the affirmative vote of all the members of the Loan Commissioners of the State of Arizona, voting as follows:

Sidney P. Osborn, Governor	Yes
Ana Frohmiller, State Auditor	Yes
J. D. Brush, State Treasurer	Yes

The Governor thereupon declared that the foregoing resolution had been unanimously adopted by the Loan Commissioners of the State of Arizona.

There being no further business to come before the meeting, upon motion duly made and seconded, the meeting was adjourned.

State Treasurer

[Endorsed]: Filed May 22, 1943. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Gwen. Roby, Deputy Clerk. [113]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT UNDER RULE 56

State of Arizona,
County of Maricopa—ss.

Earl Anderson, being first duly sworn, deposes and says:

1. That he is now and was at all the times herein mentioned, and is now, the Chief Assistant Attorney General of the State of Arizona; that in such

capacity he is personally familiar with the facts attendant upon the indebtedness of the County of Maricopa in the principal amount of \$4,100,000 of Maricopa County Highway Bonds. That in such capacity he is personally familiar with the powers and duties of the Loan Commissioners of the State of Arizona, said Commissioners being Sidney P. Osborn, Governor of the State of Arizona; Ana Frohmiller, State Auditor of the State of Arizona, and J. D. Brush, State Treasurer of the State of Arizona, in respect of funding, refunding, and [114] redeeming the indebtedness of said State of Arizona, counties, cities, and other municipalities of said State of Arizona, and the laws and statutes of said state in relation thereto.

2. That on July 7, 1941, the Board of Supervisors of Maricopa County, defendants herein, passed and adopted a resolution officially demanding that the Loan Commissioners of the State of Arizona, redeem and refund issued and outstanding Maricopa County Highway Bonds in the aggregate principal amount of \$4,900,000, which aggregate principal amount was outstanding as of said July 7, 1941.

3. That on November 7, 1941, said Loan Commissioners informed the Board of Supervisors of Maricopa County, in writing, that they were unauthorized to refund said outstanding indebtedness of Maricopa County as demanded by Maricopa County, as aforesaid, and said Loan Commissioners did thereupon refuse to redeem and refund said out-

standing Highway Bonds of Maricopa County or to provide for the refunding thereof, and thereupon, to-wit, on February 2, 1942, Maricopa County filed an original action in mandamus in the Supreme Court of the State of Arizona entitled: "Maricopa County, a Municipal Corporation, Plaintiff, vs. Sidney P. Osborn, Governor of the State of Arizona, Ana Frohmiller, State Auditor, and Joe Hunt, State Treasurer, constituting the Loan Commissioners of the State of Arizona, Defendants," No. 4489, to command said Loan Commissioners to redeem and refund said outstanding indebtedness of Maricopa County notwithstanding the refusal of said Loan Commissioners so to do.

4. That said original action filed in the Supreme Court of the State of Arizona, duly came on for hearing and decision, and on May 4, 1942, said court duly rendered and entered [115] its judgment making peremptory the alternative writ of mandamus which had theretofore issued in said action; and by said peremptory writ of mandamus said Loan Commissioners were commanded to redeem said outstanding indebtedness of Maricopa County. That said decision is reported in Ariz. and 125 P. (2d) 703, and holds and determines that Maricopa County Highway Bonds, herein the subject of litigation, are and were at all times subject to redemption and refunding prior to their respective fixed maturity dates by said Loan Commissioners of the State of Arizona. That for this reason said Loan Commissioners were commanded to redeem said outstanding indebtedness of Maricopa

County by the issuance of said peremptory writ of mandamus.

5. That pursuant to said peremptory writ of mandamus issued from the Supreme Court of the State of Arizona, said Loan Commissioners duly passed and adopted a resolution authorizing the issuance of refunding bonds of the State of Arizona for the purpose of redeeming said Maricopa County Bonds then outstanding. That through proceedings duly and regularly taken under the laws of the State of Arizona, due notice was given and bids were called for by said Loan Commissioners for the purchase of refunding bonds of the State of Arizona in the principal amount of \$4,100,000. That the Loan Commissioners of the State of Arizona on February 10, 1943, accepted the joint bid of, and awarded the purchase of said refunding bonds to, Bank of America National Trust and Savings Association, Boettcher and Company, and R. H. Moulton & Company.

6. That notwithstanding said award and sale of said State of Arizona Refunding Bonds, said Loan Commissioners, on [116] February 12, 1943, advised the Board of Supervisors of Maricopa County, in writing, as such Loan Commissioners, that they would not execute or deliver any of said refunding bonds, and said Loan Commissioners refused to execute or deliver any of said State of Arizona Refunding Bonds to said purchasers.

7. That thereupon, to-wit, on March 4th, 1943, Maricopa County filed a second original action in mandamus in the Supreme Court of the State of

Arizona entitled: "Maricopa County, a body politic and corporate, plaintiff, vs. Sidney P. Osborn, Governor of the State of Arizona; Ana Frohmiller, State Auditor of the State of Arizona, and J. D. Brush, State Treasurer of the State of Arizona, defendants," No. 4606, to command said Loan Commissioners of the State of Arizona to execute and deliver said refunding bonds to the purchasers thereof. That said Loan Commissioners duly appeared and made return in said proceedings and filed briefs therein. That said action in said Supreme Court of the State of Arizona duly came on for hearing and decision, and on April 12, 1943, said court duly rendered and entered its judgment making peremptory the alternative writ of mandamus which had theretofore issued in said action, as reported in 136 Cal. (2d) 270 (Adv. Sheet Vol. 1, May 14, 1943). That in said decision said court reaffirmed its judgment in said prior original mandamus proceeding brought by Maricopa County in the case of Maricopa County v. Osborn, et al. (1942) Ariz., 125 P. (2d) 703, and held and determined that said outstanding Maricopa County Highway Bonds are and were at all times subject to redemption and refunding by the Loan Commissioners of the State of Arizona prior to their respective fixed maturity dates. That for this reason said peremptory writ of mandamus was issued by said Supreme Court of the State of [117] Arizona to command said Loan Commissioners of the State of Arizona to execute and deliver State of Arizona Refunding Bonds in the principal amount of

\$4,100,000 to the purchasers thereof.

8. That said decisions of the Supreme Court of the State of Arizona are valid and conclusive adjudications to the effect that Maricopa County Highway Bonds are redeemable and refundable prior to their maturity dates under the laws of the State of Arizona. That said decisions are binding and conclusive on defendants as Loan Commissioners of the State of Arizona making it their legal duty to redeem and refund said outstanding indebtedness of the County of Maricopa by the issuance of State of Arizona Refunding Bonds.

9. That by virtue of the decision of the Supreme Court of the United States in the case of *Erie R.R. Co. v. Tompkins* (1938) 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 118, these decisions of the Supreme Court of Arizona finally establishing the law of the State of Arizona, as affiant verily believes, are binding and conclusive upon this court in respect of the issues raised in this action.

EARL ANDERSON

Subscribed and sworn to before me this 22nd day of May, 1943.

AGNES WESTRA

Notary Public

(Seal)

My Commission will expire: July 2, 1943.

[Endorsed]: Filed May 22, 1943. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Gwen Roby, Deputy Clerk. [118]

[Title of District Court.]

MINUTE ENTRY OF JUNE 8, 1943

(Phoenix Division)

April 1943 Term

At Phoenix

Honorable Dave W. Ling, United States District
Judge, Presiding.

[Title of Cause.]

Defendants' Motion for Summary Judgment under Rule 56(b) comes on regularly for hearing this day.

John L. Gust, Esquire, appears as counsel for the plaintiff. Leslie C. Hardy, Esquire, is present on behalf of the defendants.

Said Motion is argued, submitted and by the Court taken under advisement. [119]

[Title of District Court.]

MINUTE ENTRY OF JULY 23, 1943

(Phoenix Division)

April 1943 Term

At Phoenix

Honorable Dave W. Ling, United States District
Judge, Presiding.

[Title of Cause.]

Defendants' Motion for Summary Judgment having been argued, submitted and by the Court taken under advisement,

It is ordered that said Motion for Summary Judgment be and it is granted. [120]

In the United States District Court
for the District of Arizona

No. Civil 385—Phoenix

E. J. JONES,

Plaintiff,

v.

JIM BRUSH, State Treasurer of the State of
Arizona, SIDNEY P. OSBORN, Governor of
the State of Arizona, DAN E. GARVEY, Sec-
retary of State of the State of Arizona, MARI-
COPA COUNTY, JOHN A. FOOTE, ED
OGLESBY and PHIL ISLEY, constituting
the Board of Supervisors of Maricopa County,
Arizona,

Defendants.

SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS

Defendants herein having moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the motion for summary judgment having been argued to the Court on June 8, 1943, by counsel for the plaintiffs and defendants, whereupon the said motion for summary judgment was submitted to the Court for decision, and the court, being advised in the law, on July 23, 1943, ordered that said motion for summary judgment be granted in favor of the defendants:

Now, Therefore, in consideration of the premises,

It is Ordered, Adjudged and Decreed, and the Court does hereby order, adjudge and decree, that defendants have summary judgment in their favor against plaintiffs herein, together with the defendants' costs to be taxed by the Clerk of this Court.

Dated this 11 day of Aug. 1943.

DAVE W. LING

United States District Judge [121]

Service of a true copy of the foregoing proposed form of Summary Judgment in Favor of Defendants is acknowledged this 24th day of July, 1943.

GUST, ROSENFELD, DIVELBESS,
ROBINETTE & COOLIDGE

By FRED V. ROSENFELD

Attorneys for Plaintiffs

[Endorsed]: Proposed Summary Judgment. Filed Jul. 24, 1943. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Gwen Roby, Deputy Clerk.

[Endorsed]: Summary Judgment. Filed Aug. 12, 1943. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Wm. H. Loveless, Chief Deputy Clerk. [122]

In the United States District Court
for the District of Arizona

MINUTE ENTRY OF AUGUST 12, 1943
(Phoenix Civil Order Book)

The following proceedings were had before Honorable Dave W. Ling, United States District Judge, in Chambers at Los Angeles, California, on Wednesday, August 11, 1943:

Civ-385

E. J. JONES,

Plaintiff,

v.

JIM BRUSH, State Treasurer of the State of Arizona, SIDNEY P. OSBORN, Governor of the State of Arizona, DAN E. GARVEY, Secretary of State of the State of Arizona, MARICOPA COUNTY, JOHN A. FOOTE, ED OGLESBY and PHIL ISLEY, constituting the Board of Supervisors of Maricopa County, Arizona,

Defendants.

SUMMARY JUDGMENT IN FAVOR
OF DEFENDANTS

Defendants herein having moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the motion for summary judgment having been argued to the Court on June 8, 1943, by counsel for the plaintiffs and defendants, whereupon the said motion for summary judgment

was submitted to the Court for decision, and the court, being advised in the law, on July 23, 1943, ordered that said motion for summary judgment be granted in favor of the defendants:

Now, Therefore, in consideration of the premises,

It Is Ordered, Adjudged and Decreed, and the Court does hereby order, adjudge and decree, that defendants have summary judgment in their favor against plaintiffs herein, together with the defendants' costs to be taxed by the Clerk of this Court.

Dated this 11 day of Aug., 1943.

DAVE W. LING

United States District Judge [123]

[Title of District Court.]

Phoenix Civil Docket

Civ-385 Phoenix

[Title of Cause.]

(Clerk's Notation of Judgment in Civil Docket)

FILINGS—PROCEEDINGS

Date

1943

* * * * *

Aug. 12 Enter and file Summary Judgment in
Favor of Defendants, signed Aug. 11,
1943 at Los Angeles.

* * * * *

[124]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that E. J. Jones, the plaintiff, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that certain judgment rendered in the above entitled court and cause on the 12th day of August, 1943, said Judgment being entitled summary judgment in favor of defendants, and signed by Judge Ling on August 11, 1943, and filed and entered in the Civil Docket on August 12, 1943.

GUST, ROSENFELD, DIVELBESS,
ROBINETTE AND COOLIDGE,

201 Professional Building,
Phoenix, Arizona.

By J. L. GUST

Attorneys for Plaintiff

Received copy of within Notice of Appeal this
7th day of September, 1943.

EARL ANDERSON

LESLIE C. HARDY

Attorneys for Defendants

[Endorsed]: Filed Sep. 7, 1943. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Gwen Roby, Deputy Clerk. [125]

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men By These Presents:

That we, E. J. Jones, the plaintiff above named, as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto Jim Brush, State Treasurer of the State of Arizona, Sidney P. Osborn, Governor of the State of Arizona, Dan E. Garvey, Secretary of State of of State of Arizona, Maricopa County, John A. Foote, Ed Oglesby and Phil Isley, constituting the Board of Supervisors of Maricopa County, Arizona, the defendants above named, in the sum of Two Hundred Fifty (\$250.00) Dollars Lawful money of the United States, to be paid to the said Jim Brush, State Treasurer of the State of Arizona, Sidney P. Osborn, Governor of the State of Arizona, Dan E. Garvey, Secretary of State of the State of Arizona, Maricopa County, John A. Foote, Ed Oglesby and Phil Isley, constituting the Board of Supervisors of Maricopa County, Arizona, for which payment well and truly to be made we bind ourselves and our successors, firmly by these presents. [126]

The Condition Of This Obligation Is Such That:

Whereas, That certain judgment entitled Summary Judgment in Favor of Defendants was rendered on the 12th day of August, 1943, in the above entitled court and cause, said judgment being signed

by Judge Ling on August 11, 1943, and filed and entered in the Civil Docket on August 12, 1943; and

Whereas, the same was in favor of the above named defendants and against the principal on this bond; and

Whereas, said principal has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from said judgment,

Now, Therefore, if the said principal above named shall prosecute his said appeal with effect and shall pay all costs which have accrued in the United States District Court for the District of Arizona, and which may accrue in the United States Circuit Court of Appeals for the Ninth Circuit, then this obligation shall be void, otherwise it shall remain in full force and effect.

In Witness Whereof said principal and surety have executed these presents on this 4th day of September, 1943.

E. J. JONES

By J. L. GUST

His Attorney

Principal

[Seal]

FIDELITY AND DEPOSIT

COMPANY OF MARYLAND,

By MARJORIE WESCOTT

Attorney-in-Fact

Surety

Received copy of within Bond on Appeal this
7th day of September, 1943.

LESLIE C. HARDY

EARL ANDERSON

Attorneys for Defendants

[Endorsed]: Filed Sep. 7, 1943. Edward W. Scruggs, Clerk United States District Court for the District of Arizona. By Gwen. Roby, Deputy Clerk. [127]

[Title of District Court and Cause.]

STATEMENT OF POINTS BY PLAINTIFF
UPON WHICH HE RELIES FOR A RE-
VERSAL OF THE JUDGMENT.

1. The Federal Courts have jurisdiction of this case for the right asserted by the plaintiff arises out of the act of Congress providing for the admission of Arizona as a state, known as the Arizona Enabling Act.

2. The Arizona Enabling Act recognizes the right of the state and citizens of the state to bring actions to prevent breaches of trust committed by the officers of the state in charge of the lands donated to the state by the Enabling Act and the funds derived from such lands.

3. The plaintiff, as a citizen and taxpayer of the state of Arizona, has the right under the law of the state to bring an action to enforce the trust created by the Enabling Act.

4. The Enabling Act permits actions to enforce the trusts created by the act to be enforced by the Attorney General of the United States and by any citizen of the state whose right to bring such actions is recognized by the state law. Hence the plaintiff, whose right to bring the action is recognized by [128] the state law, may bring such action in the Federal Court for the reason that a federal question is involved.

5. Since the plaintiff asserts a right under a federal statute, the rule of *Erie R. Co. v. Tompkins* does not apply and the Federal Courts are not bound to follow the decisions of the state court but must exercise their own independent judgment in determining the case.

6. Since the complaint charges that the State Treasurer, Governor and Secretary of State propose to surrender the bonds of Maricopa County held in the trust fund for less than their recognized market value, it plainly states a case of a proposed violation of the Enabling Act, for neither the state nor any of its officials have the right to deplete or diminish the trust fund.

7. The decisions of the Supreme Court of Arizona, holding that the bonds are callable, are no justification for the proposed surrender of the bonds by the state officials as the rights of the trust fund were not in issue in the mandamus cases and the decisions of the Supreme Court of the state do not conclude the federal question involved.

8. The bonds of Maricopa County held in the State School Fund involved in this suit are not callable before their due dates for the following reasons:

(a) Chapter 2, Title 52, Revised Statutes 1913 provides that they shall be issued with definite due dates. The form of the bonds and the coupons attached thereto provide that said bonds shall bear interest until their due dates. Said bonds were ratified by Acts 54 and 86 of the Revised Statutes of 1921, after the form thereof was determined and recorded. No other statute was applicable to said bonds for the reason that said Chapter 2, Title 52, Revised Statutes 1913 is a complete act in [129] itself, providing for the issuance of said bonds and said Acts 54 and 86 Session Laws of 1921, were complete ratifications of said bonds after they were issued.

(b) Chapter 1, Title 52, Revised Statutes of 1913, is not susceptible of an interpretation authorizing the calling of bonds issued under Chapter 2, Title 52, for the reason that said Chapter 1, Title 52, was originally an Act of Congress of June 25, 1890. It was construed by subsequent acts of Congress and the territorial legislature as not authorizing the refunding of bonds thereafter to be issued and as not authorizing the refunding of bonds not yet due without the consent of the holder. It is shown by the proceedings of Congress and the reports

of its committees that said act of Congress was not intended to authorize the calling of bonds not yet due.

(c) Chapter 1, Title 52, was not changed in meaning when it became a law of the State of Arizona by virtue of the constitution nor was it changed in meaning by virtue of its re-enactment by the first special session of the first legislature of the state. Furthermore, any inconsistent provisions of said Chapter 1, Title 52, Revised Statutes 1913 were repealed by the re-enactment of said Chapter 2, as Chapter 20 of the third special session of the first legislature and by virtue of the existing state statute relating to repeal, said Chapter 1, Title 52, was repealed by said Chapter 2, Title 52, not only where it was inconsistent but wherever it covered the same subject matter.

(d) The Revised Code of 1913 as shown by Chapter 64 Session Laws of the third special session of the first legislature was not a revision but a mere compilation of the existing statutes and such compilation did not change [130] the meaning of Chapter 1, Title 52, as it had theretofore existed.

(e) That said Chapter 1, Title 52 was not capable of being construed so as to make bonds issued under Chapter 2, Title 52, callable for the reason that said Chapter 1, Title 52, can reasonably be construed to extend only to bonds that were due or optional at the time of proposed refunding.

(f) Chapter 39 Session Laws of 1927 and Chapters 74 and 75 Session Laws 1935, providing for the refunding of optional bonds only, indicate a policy of the state against permitting the refunding of bonds that were not yet due.

9. The opinions of the Supreme Court of Arizona in the mandamus suits do not consider the statutory history of Chapter 1, Title 52, and are inconsistent in that they hold that the provision providing for the refunding of bonds extends to all bonds whether due or not and yet hold that bonds that are issued under the refunding act itself are not refundable. Said decisions of the Supreme Court overlooked the fact that county, municipal and school district bonds cannot be refunded as state bonds under the provisions of Chapter 1, Title 52, for the reason that under said chapter said bonds, as the law stood before the 1928 code, were required to be issued as state bonds and could not be so issued without violating the state constitution.

10. The decisions of the Supreme Court of Arizona in the mandamus suits is not an adjudication of the rights of the bondholders as no bondholder was a party to the suit and the fact that briefs of amici curiae were filed does not give the decision of the Supreme Court the effect of such an adjudication as amici curiae do not have any control over the suit. The fact that it was stated that one of the amici curiae represented [131] a bondholder cannot bind bondholders generally under the theory that it was a class suit.

11. The complaint shows that the loss to the State School Fund, if the bonds are surrendered as proposed by the State Treasurer, Governor and Secretary of State, will greatly exceed the sum of \$3000.00. The complaint shows an actual controversy, under the proceedings that are actually pending, exists and that it is proper for the court to render a declaratory judgment, declaring that the surrender of the bonds as proposed by the State Treasurer and other state officials is a violation of the Enabling Act of the state.

Dated this 4th day of September, 1943.

GUST, ROSENFELD, DIVEL-
BESS, ROBINETTE AND
COOLIDGE,

201 Professional Building,
Phoenix, Arizona,

By J. L. GUST

Attorneys for Plaintiff

Received copy of the within Statement of Points
by Plaintiff this 7th day of September, 1943.

EARL ANDERSON

LESLIE C. HARDY

Attorneys for Defendants

[Endorsed]: Filed Sep. 7, 1943. Edward W. Scruggs, Clerk United States District Court for the District of Arizona. By Gwen. Roby, Deputy Clerk. [132]

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF THE RECORD AND PROCEEDINGS TO BE CONTAINED IN RECORD ON APPEAL.

Comes now the above named plaintiff and appellant and designates the following portions of the record and proceedings to be contained in the record on appeal:

1. Complaint.
2. Answer of defendants.
3. Notice of Motion for Summary Judgment.
4. Motion for Summary Judgment.
5. Affidavit of Leslie Hardy in support of Motion for Summary Judgment.
6. Affidavit of Earl Anderson in support of Motion for Summary Judgment.
7. Summary Judgment in favor of defendants, signed by the Court and filed in said cause.
8. The Clerk's Notation of Judgment in the Civil Docket.
9. Final Judgment as entered by the Clerk in the Civil Order Book.
10. All minute entries made by the Clerk in said cause.
11. Notice of Appeal.
12. Appeal Bond.
13. This Designation. [133]
14. Statement of Points by Plaintiff Upon Which He Relies for Reversal of the Judgment.

Dated this 4th day of September, 1943.

E. J. JONES,

Plaintiff and Appellant

By J. L. GUST

His Attorney

Received copy of within the 7th day of September, 1943.

EARL ANDERSON

LESLIE C. HARDY

Attorneys for Defendants

[Endorsed]: Filed Sep. 7, 1943. Edward W. Scruggs, Clerk United States District Court for the District of Arizona. By Gwen. Roby, Deputy Clerk. [134]

[Title of District Court.]

United States of America,
District of Arizona—ss.

I, Edward W. Scruggs, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of said court, including the records, papers and files in the case of E. J. Jones, plaintiff, versus Jim Brush, State Treasurer of the State of Arizona, Sidney P. Osborn, Governor of the State of Arizona, Dan E. Garvey, Secretary of State of the State of Arizona, Maricopa County; John A. Foote, Ed Oglesby and Phil Isley, constituting the Board of Supervisors of Maricopa

County, Arizona, defendants, numbered Civ-385 Phoenix, on the docket of said court.

I further certify that the attached pages, numbered 1 to 134, inclusive, contain a full, true and correct transcript of all the proceedings had in said cause and of all the papers filed therein, together with the endorsements of filing thereon, called for and designated in the Plaintiff's Designation of Portions of the Record and Proceedings to be Contained in Record on Appeal, filed therein and made a part of the transcript attached hereto, as the same appear from the originals of record remaining on file in my office as such clerk in the City of Phoenix, State and District aforesaid.

I further certify that the Clerk's fees for preparing and certifying this said transcript of record amounts to the sum of \$23.85, and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said court at Phoenix, Arizona, this 16th day of September, 1943.

[Seal]

EDWARD W. SCRUGGS,

Clerk

By WM. H. LOVELESS,

Chief Deputy Clerk. [135]

[Endorsed]: No. 10,560. United States Circuit Court of Appeals for the Ninth Circuit. E. J. Jones, Appellant, vs. Jim Brush, State Treasurer of the State of Arizona, Sidney P. Osborn, Governor of the State of Arizona, Dan E. Garvey, Secretary of State of the State of Arizona, Maricopa County, John A. Foote, Ed Oglesby and Phil Isley, constituting the Board of Supervisors of Maricopa County, Arizona, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed September 20, 1943.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

Number 10560

United States Circuit Court of Appeals
for the Ninth Circuit

E. J. JONES,

Appellant,

vs.

JIM BRUSH, State Treasurer of the State of Arizona, SIDNEY P. OSBORN, Governor of the State of Arizona, DAN E. GARVEY, Secretary of State of the State of Arizona, MARICOPA COUNTY, JOHN A. FOOTE, ED OGLESBY and PHIL ISLEY, Constituting the Board of Supervisors of Maricopa County, Arizona,

Appellees.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL, AND DESIGNATION OF THE PARTS OF THE RECORD WHICH APPELLANT THINKS NECESSARY FOR CONSIDERATION OF SAID POINTS.

Comes now E. J. Jones, Appellant in the above entitled cause, and hereby formally adopts the Statement of Points by plaintiff upon which he intends to rely for a reversal of the judgment filed by the appellant as plaintiff in the United States District Court, for the District of Arizona, which is a part of the record forwarded to this court by

the Clerk of the United States District Court as and for a Statement of Points on which appellant intends to rely on this appeal, required to be filed in this court under Subdivision 6 of Rule 19 of the Rules of this court, and said appellant hereby designates to be printed the whole of the record forwarded to this court by the Clerk of the United States District Court.

Dated this 27th day of September, 1943.

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Received copy of the foregoing this 27th day of
September, 1943.

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By E. W. H.

[Endorsed]: Filed Sep. 29, 1943. Paul P. O'Brien,
Clerk.

No. 10560

United States
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E. J. JONES,

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vs.

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Appellees.

APPEAL FROM UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF ARIZONA

BRIEF OF APPELLANT

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No. 10560

United States
Circuit Court of Appeals
For the Ninth Circuit

E. J. JONES,

Appellant,

vs.

JIM BRUSH, State Treasurer of the State of Arizona, SIDNEY P. OSBORN, Governor of the State of Arizona, DAN E. GARVEY, Secretary of State of the State of Arizona, MARICOPA COUNTY, JOHN A. FOOTE, ED. OGLESBY and PHIL ISLEY, Constituting the Board of Supervisors of Maricopa County, Arizona,

Appellees.

BRIEF OF APPELLANT

Note: The parties will be referred to by their designations in the District Court, viz: Appellant as plaintiff, and appellees as defendants. References to the Transcript of Record will be indicated by the letter T, followed by page number.

PRELIMINARY STATEMENT

Plaintiff brought this suit in the United States District Court, for the District of Arizona, at Phoenix, seeking a declaratory judgment against the defendants, to the effect that it would be a breach of trust

for the defendant, Jim Brush, as State Treasurer, to surrender to the defendant, Maricopa County, certain Highway Improvement Bonds of said defendant, issued in the years 1919 and 1921, and not yet due, for the reason that said bonds are not callable and to surrender the same at this time will cause a serious loss to the Trust Fund consisting of proceeds derived from the sale of lands granted to the State by the Enabling Act, for the benefit of the schools of the state. Additional relief was also prayed for.

The bonds involved are of the same issues as those involved in the case of, *State of Washington and Equitable Life Insurance Company, Appellants, vs. Maricopa County, et al*, Number 10493, bonds of said issues having been purchased by the State Treasurer with said school funds in the aggregate amount of Fifty-six Thousand Dollars.

STATEMENT OF JURISDICTION

I

Jurisdiction of District Court

The cause of action arises out of the Enabling Act, admitting the State of Arizona into the Union. (Act of Cong. June 20, 1910). The provisions of said Act upon which the complaint is based are the following:

“Section 28. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to said Territory, are hereby expressly transferred and confirmed

to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than for such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

* * *

“Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this act shall be null and void, any provisions of the Constitution or laws of the said State to the contrary notwithstanding. It shall be the duty of the Attorney General of the United States to prosecute, in the name of the United States and in its courts, such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.

Nothing herein contained shall be taken as in limitation of the power of the State or of any citizen thereof to enforce the provisions of this Act."

The right of the Attorney General of the United States to enforce the above trusts has been upheld by the United States Supreme Court.

Ervien Commissioner of Public Lands of the State of New Mexico, v. U. S., 251 U. S. 41;
64 Law ed. 128;
40 Sup. Ct. Rep. 75.

The Supreme Court of New Mexico has held that under the laws of that state, a citizen and taxpayer has no right to maintain an action to prohibit the improper disposition of such trust funds under the provisions of the Enabling Act.

Asplund v. Hannett, 249 Pac. 1074;
31 N. Mex. 641;
58 A. L. R. 573.

The Circuit Court of Appeals, Eighth Circuit, has followed the above decision.

Downer v. Graham, 21 Fed. (2d) 732.

The Supreme Court of Arizona, however, has reached the conclusion that a citizen of Arizona may enforce the prohibitions against an improper expenditure of proceeds of federal land grant funds imposed by the Enabling Act.

Rowlands v. State Loan Board, 24 Ariz. 116, 123;
207 Pac. 359.

Boyce v. Pima County, 24 Ariz. 259;
208 Pac. 419.

The Enabling Act did not grant to citizens of the state the right to enforce the restrictions upon the expenditure of state land grant funds, but it took away no such right that otherwise might exist. The express language of the act being,

“Nothing herein contained shall be taken as in limitation of the power of the state or of any citizen thereof to enforce the provisions of this act”.

Sec. 28, Ariz. Enabling Act (Act of Cong. June 20, 1910).

It appears from the Enabling Act that Congress has provided that the trust created by the Enabling Act may be enforced by the United States Attorney General, and by the State, and has adopted the state law for determining who may exercise the state's right to enforce the provisions of the trust.

In New Mexico, it is held that citizens and taxpayers do not have such a right. In Arizona it is held, under the state law, that any citizen has such right. The adoption by Congress of state law for such purposes is not unusual.

In *Jackson County v. U. S.*, 84 Law ed. 313, 317, 308 U. S. 343, 60 Sup. Ct. Rep. 285, the court says:

“With reference to other federal rights the state law has been absorbed as it were as the governing federal rule, not because state law was the source of the right, but because recognition of state interests was not deemed inconsistent with federal policy.”

When the state law recognizes the right to enforce such provisions the federal courts have jurisdiction by reason of the fact that such an action is a suit arising under the laws of the United States within the meaning of *Section 41, Title 28, U. S. Code Ann.*

King County v. Seattle School Dist.,
68 Law ed. 339;
263 U. S. 361;
44 Sup. Ct. Rep. 127.

The federal jurisdiction in such a case is also recognized by the Circuit Court of Appeals, Eighth Circuit, in *Downer v. Graham*, 21 Fed. (2d) 732, and is supported by the general principle that wherever a right asserted by a plaintiff depends upon the construction to be placed upon a federal statute, the case arises under the laws of the United States.

First Nat. Bank v. Williams, 252 U. S. 504, 512;
64 Law ed. 692;
40 Sup. Ct. Rep. 374.

Hopkins v. Walker, 244 U. S. 486, 489;
61 Law ed. 270;
37 Sup. Ct. Rep. 711.

Northern Pacific Ry. Co. v. Soderberg,
188 U. S. 526, 528;
47 Law ed. 575;
23 Sup. Ct. Rep. 365.

Cooke v. Avery, 147 U. S. 375, 390;
37 Law ed. 209;
13 Sup. Ct. Rep. 340.

The New Mexico cases are no obstacle to the right of the plaintiff to maintain this suit. Whether the surrender of the bonds in question by the State Treasurer will constitute a breach of trust depends upon the provisions of the Enabling Act, and hence, any case presenting that question involves a federal question, and the federal courts have jurisdiction. The question of who, in addition to the Attorney General of the United States may enforce the terms of the trust, is left by the Enabling Act to the law of the state. The decision of the Supreme Court of New Mexico adopting the minority rule, (Note 58 A. L. R. 589) that a taxpayer can not maintain such an action settles the law of New Mexico, and hence, it follows that such an action cannot be maintained by a taxpayer in New Mexico. But, when the Supreme Court of Arizona adopted the rule that a citizen of the state might enforce the trusts created by the act, that settled that question for the state of Arizona, because the Enabling Act had adopted the law of the state for that purpose, but when such citizen or taxpayer comes into court to enforce the rights under the trust, he is enforcing rights granted by the Enabling Act, which is a federal act, and thus, his complaint presents a federal question under *Sec. 41, Title 28 U. S. Code Ann.*

The complaint alleges that the loss incurred by the state if these bonds are presently surrendered will exceed Three Thousand Dollars. (T. 4, 5).

II

Jurisdiction Under Declaratory Judgment Act

The relief sought is under the Declaratory Judgment Act. (T. 57). Additional relief is also prayed for. An actual controversy exists, for defendant State Treasurer is recognizing the decision made by the Supreme Court of Arizona, and is about to surrender bonds in deference to that decision. The plaintiff maintains that the Treasurer has not the right to surrender such bonds and thereby impair the fund in his custody for the reason that there has been no authoritative determination of such right, the question of the proper construction of the Enabling Act in that respect, being a question for the federal courts. Hence, plaintiff seeks a determination of the question in those courts. That there is an actual controversy pending is established by the following cases:

Maryland Casualty Co., v. Pacific Coal & Oil Co.,
312 U. S. 270;
85 Law ed. 826;
61 Sup. Ct. Rep. 510.

Aetna Life Ins. Co. v. Haworth, 300 U. S. 227;
81 L. ed. 617;
57 Sup. Ct. Rep. 461.

Stoner v. New York Life Ins. Co.,
311 U. S. 464;
85 L. ed. 284;
61 Sup. Ct. Rep. 336.

The additional relief prayed for also sustains federal jurisdiction.

III

Jurisdiction of Circuit Court of Appeals

The judgment rendered in this case is a summary judgment, rendered pursuant to Rule 56 of the *Rules of Civil Procedure*, (T. 139-143), and is a final judgment.

28 U. S. Code Ann., 400.

Appeal therefrom lies under 28 U. S. Code Ann., Sec. 225, the general statute on appeal, and within the time limit allowed by 28 U. S. Code Ann., Sec. 230. Notice of appeal was seasonably given and appeal bond filed. (T. 143-145).

STATEMENT OF FACTS

The facts alleged in the complaint, (T. 2-58) are as follows:

Plaintiff sues as a citizen, resident and taxpayer of the state of Arizona, and as such, claims the right to enforce the trusts created by the Enabling Act of the State of Arizona, (T. 2-3).

Defendant, Jim Brush, as State Treasurer, is the custodian of the funds and securities derived by the state, in trust, under the provisions of the Enabling Act, and is charged with the duty of investing such funds. (T. 3).

Defendants, Sidney P. Osborn and Dan E. Garvey, are Governor and Secretary of State, respectively, and charged with the duty of approving securities in which

the State Treasurer invests money of said trusts. (T. 3).

Defendants, John A. Foote, Ed. Oglesby and Phil Isley, constitute the Board of Supervisors of Maricopa County, (T. 3).

The jurisdiction of the United States District Court is invoked upon the ground that this is a case arising under the Arizona Enabling Act, (Act. of Cong., June 20, 1910), (T. 3-4).

Defendant, Jim Brush, as State Treasurer of Arizona, is trustee or custodian of a total of \$56,000.00 par value of two issues of Maricopa County Highway Bonds, \$31,000.00 being of the 1919 issue, bearing $5\frac{1}{2}\%$ interest per annum, and becoming due and payable on the 15th day of June, during the years 1945 to 1949, inclusive, and \$25,000.00 being of the 1921 issue, bearing 6% interest per annum, and becoming due and payable on the 15th day of January, during the years 1944 to 1951, both inclusive. All of said bonds are owned by the State of Arizona, and are held in that portion of the trust created by Sections 24 to 28, both inclusive, of the Enabling Act, known as the Permanent School Fund. (T. 4). All of said bonds are due and payable on definite dates, and defendant Maricopa County is legally bound to pay the agreed rate of interest thereon until the due dates therein specified. (T. 4).

The difference between the value of said bonds, if the county is legally bound to pay the agreed rate of interest thereon until their respective due dates, and their value if they are presently subject to call for re-

demption as is contended by Maricopa County, exceeds the sum of \$3,000.00. (T. 4-5).

Both issues of said bonds were issued under Chapter 2, Title 52, *Arizona Revised Statutes of 1913*, and Chapter 31, *Arizona Session Laws of 1917*. (T. 5-9). Under said statutes said bonds were required to be issued with definite due dates. There was no provision in said statutes, nor any custom, statute, law or practice of the State of Arizona at the date of the issuance of said bonds, contemplating the calling of said bonds before their maturity dates. (T. 9).

Under said statutes, both of said bond issues were issued with definite maturity dates, extending over a period of twenty years, beginning with the year 1930 for the first issue, and the year 1931 for the second issue. (T. 10, 20). The proceedings for the issuance of said bonds provided that said bonds should be payable on definite maturity dates, and the proposition voted on by the electors authorized such dates. (T. 11, 21).

The form of said bonds provided for definite maturity dates, and coupons attached provided for the interest payable on such dates. (T. 15, 25). After the form of said bonds was adopted and placed on record, both of said issues of bonds were ratified and approved by the legislature of the state of Arizona. (T. 18, 28).

Thereafter, said bonds were purchased in the open market by various purchasers, and the State Treasurer of the State of Arizona, with the approval of the Governor and Secretary of State, purchased said

bonds, and in reliance upon the provisions in said bonds, the proceedings for their issuance, and the statutes of the state, paid a large premium for the right to collect interest on said bonds to their due dates. (T. 19, 29).

Accrued interest has been paid on said bonds, and the bonds that have become due have been paid. (T. 30).

In the year 1942, the Board of Supervisors of Maricopa County adopted a resolution demanding that the State Loan Commissioners of the State of Arizona proceed to refund these bonds, claiming that said bonds were redeemable by the State Loan Commissioners at any time when a saving could be effected to the county, notwithstanding the definite maturity dates therein contained. (T. 30). The State Loan Commissioners at first refused the request. Thereupon, a mandamus action was brought to compel them to proceed. Maricopa County and said Loan Commissioners were the only parties to said proceeding. The Supreme Court of Arizona, in said mandamus action, sustained the contention of said Supervisors. (T. 30-31).

Thereafter, the Loan Commissioners advertised for sale the refunding bonds, the proceeds of which were to be used for calling in the outstanding bonds. (T. 31). One bid was received and was accepted by said Loan Commissioners, (T. 31, 32), and, after the acceptance thereof, the bidder requested the bringing of a further mandamus suit in the state Supreme Court to determine the validity of said bonds and the eventual sale and delivery thereof to the bidder. Such suit was brought and the Supreme Court of Arizona

entered judgment in this second mandamus suit, requiring the Loan Commissioners to proceed with the issuance of said bonds. (T. 32-35). Maricopa County and said Loan Commissioners were the only parties to said suit. (T. 32).

The defendants, Jim Brush, as Treasurer, and the defendants, Sidney P. Osborn and Dan E. Garvey, as Governor and Secretary of State, respectively, of the state of Arizona, assert and declare that they, as officers of the State, are bound to abide by the decision of the Supreme Court in the two above mentioned mandamus suits, and they will surrender the above described bonds held in trust for the schools of said state in deference to said decisions, immediately upon call for the redemption of said bonds being made. (T. 35).

Plaintiff alleges there is imposed upon the said defendants the duty to protect the school funds and other funds derived from lands donated to the state of Arizona by the federal government from loss, impairment or diminution, by all lawful means within their power, and that it is their duty under the provisions of the Enabling Act to resist the unlawful depletion of said trust funds by the above mentioned erroneous decisions of the Supreme Court of Arizona, by resorting to the federal courts to prevent the threatened unlawful call and redemption of said bonds, and the consequent depletion of the trust funds thereby. (T. 35, 36).

The surrender of said bonds before their due dates, and the subsequent loss caused thereby to said trust fund, in deference to the above mentioned mandamus

decisions of the state Supreme Court, without submitting said question to the federal courts, which are charged with the duty of protecting said trust funds, will constitute a breach of trust by said defendants, and entitles the plaintiff, as a citizen of the State of Arizona, to bring an action to restrain the contemplated surrender of said bonds. (T. 35-36).

Owing to the doubt as to the validity of the refunding bonds, the price to be paid for the bonds by the single bidder therefor is too low. (T. 36-37). The refunding proceedings are a plan or scheme in which other counties, municipalities and school districts of the state are participating, and the purpose of said scheme is to obtain the redemption of various outstanding issues of bonds held by various counties, municipalities and school districts in the state, and if said plan or scheme is successful, other issues of counties, municipalities, school districts and other subdivisions of the state will be refunded and be redeemed by like proceedings through the State Loan Commissioners, under the same statutory provisions. Some of the municipalities and school districts of Arizona have already taken action looking toward such refunding, and will demand the same of the State Loan Commissioners as soon as the above described Maricopa County Highway bonds are successfully refunded. (T. 37, 38).

Defendant, Jim Brush, holds in the several trust funds under the Enabling Act, a total of over One Million Dollars par value of bonds that will be subject to refunding under the above mentioned decisions of the Supreme Court of Arizona. The refunding and

redemption of such bonds will cause a loss to the several funds of the trusts created by the Enabling Act of over One Hundred Thousand Dollars. (T. 37-38).

All of said bonds are in the main subject to the same arguments in support of refunding, but some of them, issued after the first of July, 1929, are not subject to the contention that the contract created by their issuance was impaired by a state statute that was passed subsequent to the issuance of said bonds. That distinction is immaterial in this suit by reason of the fact that this is a suit brought to protect a trust created under the Enabling Act of the State of Arizona. (T. 38-39).

The loss that will be caused by the surrender of the two bond issues involved in the present proceedings will greatly exceed the sum of Three Thousand Dollars, and the loss that will be caused by the surrender of all of the bonds that are in a similar legal situation will exceed the sum of One Hundred Thousand Dollars. (T. 39).

The defendants are proposing to refund and call the outstanding bonds under the provisions of Article 4, Chapter 10, *Arizona Code Annotated*, 1939, which first became a law of the State of Arizona as Article 4, Chapter 60, *Arizona Revised Code*, 1928, which became effective on the first day of July, 1929, several years after the issuance of the above mentioned bonds. Said statute is a law impairing the obligation of contract. (T. 40).

Said statute cannot be reasonably interpreted to authorize the call of bonds theretofore issued with

definite due dates. (T. 41-54). That to surrender said bonds held under the Enabling Act will constitute a breach of trust and will operate as a diversion of trust moneys derived from the lands donated to the State under the provisions of the Enabling Act. (T. 55).

The decisions of the Supreme Court of Arizona, in the suits above mentioned, are not binding upon the federal courts. (T. 55-57).

This suit is brought under the provisions of the Declaratory Judgment Act. Additional relief is also sought if found necessary. (T. 57).

The proceedings for the issuance of said refunding bonds are initiated and put into operation by resolutions adopted by the Board of Supervisors of Maricopa County. (T. 30-31).

The facts in regard to the bond issues affected by this action, and the proceedings for the redemption and call thereof before their due dates, are the same as in Case No. 10493, now pending on appeal in this court.

ASSIGNMENTS OF ERROR.

Assignment of Error No. 1.

The District Court erred in entering summary judgment against the plaintiff on the motion of the defendants, for the reason that the complaint shows that the plaintiff, as a citizen and taxpayer of the state of

Arizona, has the right, under the laws of the state of Arizona as set forth in the decisions of its courts, and the provisions of the Enabling Act, to enforce the provisions of said Enabling Act prohibiting the diversion, depletion and diminution of the trust funds derived from the sale of lands donated to the State of Arizona by the United States, and that said complaint states a case for declaratory relief within the jurisdiction of the United States District Court, in that it shows an actual controversy between the plaintiff in the exercise of his said right as a citizen and taxpayer of the state of Arizona and defendants, over the proposed action of the defendants to surrender the bonds held by them in the trust created by the Enabling Act, at a substantial loss to said trust fund, said controversy being that the defendants contend that it is their duty to follow the decisions of the Supreme Court of Arizona in the mandamus suits and recognize said bonds as callable, and the plaintiff contends that said decisions of the said Supreme Court are erroneous and not binding upon defendants, and that it is the duty of the defendants to await the determination of the federal courts which are charged with the duty of protecting said trust funds against unlawful diversions, depletions or diminutions.

That said complaint further shows that said bonds bear interest at rates much higher than the current market rate so that the surrender of said bonds at par as is proposed by defendants will deplete the trust fund to the extent of the difference between the amount of interest that will be earned by said bonds before their maturity dates, and the lesser amount of interest that can be earned at the current interest

rate by the money derived from the surrender of said bonds during the same period.

That said complaint further shows that said bonds bear definite maturity dates, and are not callable before maturity, for the reason that said bonds constitute contracts made by Maricopa County under authority granted to it by the State Legislature to pay fixed rates of interest on said bonds until the maturity dates therein specified, without any reservation to call said bonds and stop the payment of interest thereon before their maturity. Said contracts were expressly authorized by Chapter 2 of Title 52, Revised Statutes of 1913, and Chapter 1, of Title 52, Revised Statutes of 1913, is not applicable to said contracts because:

(a) Said Chapter 1 was originally an Act of Congress, passed in the year 1890, for the refunding of certain territorial indebtedness then existing, and that the authority to fund or refund indebtedness under said act and supplements thereto expired January 1, 1897, and such authority was not revived by the re-enactment of said statute upon statehood;

(b) Said statute did not authorize the refunding of bonds which were not due or redeemable according to their terms without the consent of the holders of such bonds;

(c) Said Act of Congress of 1890 provided for the refunding of county bonds with territorial bonds, and, even though re-enacted upon statehood, by the first legislature of Arizona, was inoperative by reason of Section 5 of Article 9 of the Arizona State Constitu-

tion which prohibits the creation of state indebtedness for such purpose;

(d) If said statute had or could have authorized a redemption of county bonds prior to their maturity, such power was repealed by the later enactment of Chapter 2, Title 52, Revised Statutes of 1913, by reason of inconsistent provisions contained in said Chapter 2, as well as by the express provisions of the statutes of Arizona providing that a later statute repeals a prior statute covering the same subject, even though the two statutes are not inconsistent;

(e) The bonds described in the complaint contain positive covenants and agreements of Maricopa County to pay interest thereon at the specified rates until their maturity dates, and these covenants and agreements were ratified and approved by the state legislature by Chapters 54 and 86 of Arizona Session Laws 1921, ratifying and approving said bonds after the form of said bonds containing said covenants and agreements had been made a matter of public record, thereby precluding the redemption and call of said bonds in violation of said covenants and agreements.

The amount involved in this case exceeds the sum of Three Thousand Dollars.

The affidavits filed in support of the motion for summary judgment presented no defense to the complaint. The facts show that jurisdiction of the federal courts is properly invoked, that a case is presented for the exercise of independent judgment of the federal courts upon the contracts involved, and the exercise

of such independent judgment must necessarily result in granting the relief sought by the plaintiff.

Assignment of Error No. 2.

The District Court erred in entering summary judgment against the plaintiff on the motion of the defendants, for the reason that the complaint shows that the plaintiff, as a citizen and taxpayer of the state of Arizona, has the right under the law of the state of Arizona, as set forth in the decisions of its courts, and the Arizona Enabling Act, to bring an action to enforce the provisions of said Enabling Act prohibiting the diversion, depletion and diminution of the trust funds derived from the sale of lands donated to the state of Arizona by the United States, under the provisions of the Enabling Act, and that in his capacity as a citizen and taxpayer of the state of Arizona, the plaintiff has the right to bring action in the district court of the United States to enforce the provisions of the Arizona Enabling Act to enjoin the diversion, depletion and diminution of the funds derived from the sale of the land donated to the state of Arizona by the United States, under the provisions of the Enabling Act, and to enjoin the use of said funds for unauthorized purposes, and that the complaint shows that the defendants' propose to divert, diminish and deplete the trust funds in their custody under the provisions of the Arizona Enabling Act, by surrendering bonds to Maricopa County at their par value when the amount paid for said bonds at their purchase, and their present market value, is greatly in excess of their par value. That while said defendants propose to surrender said bonds upon the ground that the

same have been held by the Supreme Court of Arizona to be callable at their par value, the decision of the Supreme Court of Arizona on this question is not binding, and said defendants cannot lawfully accept such decision of the Supreme Court of Arizona until the same is approved by the federal courts, to which the protection of said trust funds is committed by the Enabling Act, and that said bonds so proposed to be surrendered bear definite maturity dates, and they are not callable under any pretense prior to such maturity dates, for the reason that by the statutes and proceedings under which they were issued, contracts were created between Maricopa County and all future holders of said bonds, binding said county to pay interest thereon at the rates therein specified until the due date of said bonds. Said contracts were expressly authorized by Chapter 2 of Title 52, Revised Statutes of 1913, and Chapter 1, of Title 52, Revised Statutes of 1913, is not applicable to said contracts because:

(a) Said Chapter 1 was originally an Act of Congress, passed in the year 1890, for the refunding of certain territorial indebtedness then existing, and that the authority to fund or refund indebtedness under said act and supplements thereto expired January 1, 1897, and such authority was not revived by the reenactment of said statute upon statehood;

(b) Said statute did not authorize the refunding of bonds which were not due or redeemable according to their terms without the consent of the holders of such bonds;

(c) Said Act of Congress of 1890 provided for the refunding of county bonds with territorial bonds and,

even though re-enacted, upon statehood, by the first legislature of Arizona, was inoperative by reason of Section 5 of Article 9 of the Arizona State Constitution which prohibits the creation of state indebtedness for such purpose;

(d) If said statute had or could have authorized a redemption of county bonds prior to their maturity, such power was repealed by the later enactment of Chapter 2, Title 52, Revised Statutes of 1913, by reason of inconsistent provisions contained in said Chapter 2, as well as by the express provisions of the statutes of Arizona providing that a later statute repeals a prior statute covering the same subject, even though the two statutes are not inconsistent;

(e) The bonds described in the complaint contain positive covenants and agreements of Maricopa County to pay interest thereon at the specified rates until their maturity dates and these covenants and agreements were ratified and approved by the state legislature by Chapters 54 and 86 of Arizona Session Laws, 1921, ratifying and approving said bonds after the form of said bonds containing said covenants and agreements had been made a matter of public record, thereby precluding the redemption and call of said bonds in violation of said covenants and agreements.

The amount involved in this case exceeds the sum of Three Thousand Dollars.

The affidavits filed in support of the motion for summary judgment presented no defense to the complaint. The facts show that jurisdiction of the federal courts is properly invoked, that a case is presented for

the exercise of independent judgment of the federal courts upon the contracts involved, and the exercise of such independent judgment must necessarily result in granting the relief sought by the plaintiff under the allegations of the complaint and the prayer thereof, such relief is not limited to a declaratory judgment.

ARGUMENT

Preliminary

Assignment No. 1 is directed to the refusal of the District Court to grant declaratory relief. Assignment No. 2 is directed to the refusal of the District Court to grant injunctive relief. Both of these assignments are based upon the right of the plaintiff as a citizen and taxpayer of Arizona to prevent the depletion and diminution of the trust funds created by the Arizona Enabling Act. Inasmuch as the arguments applicable to the two assignments are similar, we shall discuss the assignments collectively.

Three primary questions are presented for decision:

1. Have the federal courts jurisdiction to exercise their independent judgment on the merits of the case under the decision of the Supreme Court, in *Erie R. Co. v. Tompkins*, notwithstanding the opinions of the State Supreme Court in the two mandamus cases?
2. What is the true interpretation of the contracts created by the issuance of plaintiff's bonds?
3. Will the surrender of the bonds involved in this

case as proposed by defendants, constitute a breach of the trusts created by the Arizona Enabling Act, which may be prevented by plaintiff as a citizen and taxpayer?

The federal courts have jurisdiction and are required to exercise their independent judgment on the merits of this case, notwithstanding the opinions of the State Supreme Court in the two mandamus suits.

(a) The case of *Erie R. Co., v. Tompkins*, 82 L. ed. 1188, 1194, 304 U. S. 64, 58 Sup. Ct. Rep. 817, 114 A. L. R. 1487, has no application to rights having their origin in the Constitution and statutes of the United States.

Clearfield Trust Co. v. U. S. 87 L. ed. 524 (Adv.)
63 Sup. Ct. Rep. 573 (Adv.)

Doench v. Federal Deposit Ins. Corp.,
86 L. ed. 956, 961, 315 U. S. 447,
62 Sup. Ct. Rep. 676.

Deitrich v. Graeny, 84 L. ed. 694, 309 U. S. 190,
60 Sup. Ct. Rep. 480.

Jackson County v. U. S. 84 L. ed. 313, 316,
308 U. S. 343,
60 Sup. Ct. Rep. 285.

United States v. Pink, 86 L. ed. 796, 818,
315 U. S. 203,
62 Sup. Ct. Rep. 552.
Prudence Realization Carp., v. Geist,
86 L. ed. 1293, 1298,

316 U. S. 89,
62 Sup. Ct. Rep. 978.
Bailey v. Central Vermont R. Co.,
87 L. ed. 1030 (Adv.)
63 Sup. Ct. Rep. 1062 (Adv.)

Sola Electric Co. v. Jefferson Electric Co.,
317 U. S. 173,
87 L. ed. 150, 152 (Adv.)
63 Sup. Ct. Rep. 172 (Adv.)

Fisher v. Whiton, 317 U. S. 217,
87 L. ed. 167 (Adv.)
62 Sup. Ct. Rep. 175 (Adv.)

Garrett v. Moore McCormack Co.,
317 U. S. 239,
87 L. ed. 183, 185 (Adv.)
63 Sup. Ct. Rep. 246 (Adv.)

Wragg v. Federal Land Bank of New Orleans,
317 U. S. 325,
87 L. ed. 273, 275 (Adv.)
63 Sup. Ct. Rep. 273 (Adv.)

United States v. Pelzer,
312 U. S. 399,
85 L. ed. 913,
61 Sup. Ct. Rep. 659.

Lyon v. Mutual Health Benefit & Accident Assn.,
305 U. S. 484,
83 L. ed 303, 308,
59 Sup. Ct. Rep. 297.

Helvering v. Leonard,
 310 U. S. 80,
 84 L. ed. 1087, 1092,
 60 Sup. Ct. Rep. 780.

Erie R. Co. v. Tompkins, has never been considered as having application to cases involving a question arising under the federal Constitution or federal laws or even under non-statutory rights or claims based on federal policy. The rule of *Swift v. Tyson*, 16 Peters, 1, 10 L. ed. 865, overruled by the *Erie* case was limited to so-called questions of general law. The federal courts always recognized the binding effect of state statutes and rules of practice, subject, however, to the rule that such local statutes or rules of practice could not be allowed to defeat or impair a federal right.

Davis v. Wechsler, 263 U. S. 22,
 68 L. ed. 143, 145,
 44 Sup. Ct. Rep. 13.

Ward v. Love County,
 253 U. S. 17,
 64 L. ed. 751,
 40 Sup. Ct. Rep. 419.

Appelby v. New York,
 271 U. S. 364,
 70 L. ed. 992, 999,
 46 Sup. Ct. Rep. 569.

Since *Erie R. Co. v. Tompkins* this rule remains the same.

Municipal Investors' Assn., v. Birmingham,
 316 U. S. 153,
 86 L. ed. 1341, 1343,
 62 Sup. Ct. Rep. 975.

Washington University v. Gorman,
 153 S. W. (2d) 35, 38.

The opinion in the *Erie* case was careful to point out that the rule that federal courts were bound to follow the decisions of the courts of the state was subject to the exception of "matters governed by the federal Constitution or by acts of Congress". This exception was taken from Section 34 of the *Federal Judiciary Act*, 28 U. S. Code Ann. 725. The exception was recognized in the opinion in a case filed on the same day by Justice Brandeis as the decision in the *Erie* case.

Hinderlider v. LaPlatta R. & Cherry Creek
 D. Co., 304 U. S. 92; 82 L. ed. 1202,
 58 Sup. Ct. Rep. 803,

and also in a case which was under consideration at the same time as the *Erie* case, involving the impairment of the obligation of a contract. The opinion in this case was filed shortly after the decision in the *Erie* case.

J. D. Adams Mfg. Co. v. Storen,
 304 U. S. 307,
 82 L. ed. 1365,
 58 Sup. Ct. Rep. 251.

In point, also, on this question is the long line of

cases decided since *Erie R. Co. v. Tompkins*, holding that that case has no application to cases in which jurisdiction of federal courts is based upon impairment of the obligation of a contract.

Municipal Investors' Assn., v. Birmingham,
316 U. S. 153,
86 L. ed. 1341, 1343,
62 Sup. Ct. Rep. 975.

Irving Trust Co. v. Day,
314 U. S. 556,
86 L. ed. 452, 457,
62 Sup. Ct. Rep. 398.

Wood v. Lovette,
313 U. S. 362,
85 L. ed. 1404, 1407,
61 Sup. Ct. Rep. 983.

Higginbotham v. Baton Rouge,
306 U. S. 535,
83 L. ed. 968, 971,
59 Sup. Ct. Rep. 705.

American Toll Bridge Co. v. RR. Commission of
Calif.,
307 U. S. 486,
83 L. ed. 1414, 1419,
59 Sup. Ct. Rep. 948.

Note: 140 A. L. R. 731

Cone v. Rorick, 112 Federal (2d) 894, 897.

Washington University v. Gorman, 158 S. W.
(2d) 35, 38 (Mo.)

However, federal jurisdiction in this case exists independently of showing impairment of contract obligations or deprivation of property without due process. There is to be enforced in this case, through the agency of the plaintiff, the right of the United States to preserve the proceeds of land donated by it for the purposes declared by the Enabling Act. This is a federal right, and in its enforcement federal courts are not limited to merely preventing the state courts from overstepping the bounds set by Section 10 Article 1 or the Fourteenth Amendment to the Federal Constitution, but are charged with the duty of enforcing the right of the federal government according to their own ideas of right and justice.

Clearfield Trust Co., v. U. S.,
87 L. ed. 524 (Adv.);
63 Sup. Ct. Rep. 573 (Adv.)

McNabb v. U. S., 318 U. S. 332;
87 L. ed. 579;
60 Sup. Ct. Rep. 608.

The decisions of this court have consistently recognized the fact that the case of *Erie R. Co., v. Tompkins* does not apply where a federal question is involved.

Getz v. Nevada Irrigation Dist., 112 Fed. (2d),
495, 497.

Alameda County v. U. S. 124 Fed. (2d) 612,
616.

Toole County Irrigation Dist., v. Moody, 125
Fed. (2d) 498.

In the *Getz* case, *supra*, this court pointed out that the alleged contract was not impaired because it was modified in accordance with a provision therein contained.

In the *Alameda County* case, *supra*, this court says:

“Under the rule of *Erie R. Co. v. Tompkins*, *supra*, state law is applicable to all cases except ‘in matters governed by the Federal Constitution or by acts of Congress’. The exception has been enlarged to include also treaties.”

In the *Too'le County Irrigation District* case, *supra*, this court held that it was bound by the later decisions of the Supreme Court of Montana in determining the nature of the obligation created by the issuance of the bonds there involved. Jurisdiction was based on diversity of citizenship. The existence of a federal question was not alleged nor could it have been because no subsequent statutes, ordinances or resolutions were enacted. The conflicting decisions of the Supreme Court of Montana were all made after the issuance of the bonds involved so that case obviously fell within the rule of *Erie R. Co. v. Tompkins* as a diversity of citizenship case in which the federal courts are bound to apply the law of the state as it exists at the time. Obviously no mention of the fact that the rule of *Erie R. Co. v. Tompkins* did not apply to cases involving a federal question was called for in that case.

Where a case is brought in the United States District Court, federal jurisdiction is determined from the allegations of the complaint. If the complaint sets up a claim, apparently in good faith and not frivolous,

that the plaintiff has or claims a federal right, federal jurisdiction is established.

Pacific Electric Ry. Co. v. Los Angeles,
194 U. S. 112,
48 L. ed. 896,
24 Sup. Ct. Rep. 586.

Illinois Central RR. Co. v. Adams,
180 U. S. 28, 36,
45 L. ed. 410,
21 Sup. Ct. Rep. 251

City Ry. Co. v. Citizens RR. Co.,
166 U. S. 557, 562,
41 L. ed. 1114,
17 Sup. Ct. Rep. 653.

Cuyahoga River Power Co., v. Akron,
240 U. S. 462,
60 L. ed. 743,
36 Sup. Ct. Rep. 402,

Mosher v. Phoenix, 287 U. S. 29,
77 L. ed. 148,
53 Sup. Ct. Rep. 67.

South Covington etc. Ry. Co., v. Newport,
259 U. S. 97,
66 L. ed 843,
42 Sup. Ct. Rep. 418.

The case made by the complaint in this case falls squarely under the above decisions of the Supreme Court of the United States. The bonds which the de-

fendants propose to surrender to Maricopa County at a substantial loss in deference to the opinions of the Supreme Court of the State of Arizona, were purchased with funds derived from the sale of lands donated to the State of Arizona by the United States in the Arizona Enabling Act. Under the provisions of that act the lands and all proceeds derived therefrom were declared a trust fund, and it was provided that such lands and proceeds of the sale thereof should be held inviolate for the purposes for which they were donated, which in this particular instance was the support of the common schools in the state. It was made the duty of the Attorney General of the United States to enforce the provisions of the Enabling Act. It was further provided that nothing in the act contained should prevent the state or any citizen of the state from enforcing the provisions of the Enabling Act. This provision conferred no rights on citizens of the state to enforce the conditions and limitations of the trust, but left to them unimpaired whatever rights they had under the state law. The Supreme Court of Arizona has held that under the law of the state, citizens and taxpayers of the state have the right to enforce the trusts in question. The Enabling Act, having created the trust, set forth the purposes and limitations thereof. It follows, any action to enforce such purposes and limitations arises under a federal statute and comes within the jurisdiction of the federal courts.

Sec. 41, Title 28 U. S. Code Ann.

No one will deny that if the Attorney General of the United States brought an action to enforce the provisions of the trust, the federal courts would have juris-

diction, and the federal law would determine the proper construction of the trust created by the Enabling Act. When a citizen of a state under the law of the state takes advantage of the provision of the Enabling Act permitting him to enforce the trust, he is enforcing the same federal right that the Attorney General of the United States would enforce if he brought the action. The nature of the right as a federal right is not affected by the agency that enforces it.

The trust created by the several Enabling Acts of recently admitted states are of the highest order. The federal government, having knowledge of the fact that school lands donated to some of the older states had been dissipated, in the more recent Enabling Act guarded the lands and the proceeds of lands donated thereby by very stringent provisions. Plainly the right to protect these funds on behalf of the federal government requires the federal courts to exercise their independent judgment under the authorities above cited.

II

The statutes of Arizona in effect when plaintiff's bonds were issued are not capable of being construed so as to make plaintiff's bonds callable before their maturity dates.

Briefly stated, our contention under this heading is that the Supreme Court of Arizona, in the two mandamus cases, *Maricopa County v. Osborn*, 125 Pac. (2d) 703, and *Maricopa County v. Osborn*, 136 Pac. (2d) 270, took an Act of Congress, passed in 1890, for the purpose of refunding certain territorial and municipal obligations which, according to its terms as

extended by supplemental acts, ceased to operate in 1897, became a dead letter after statehood by reason of being in conflict with the provisions of the State Constitution, was rewritten as a new act in the Revised Code of 1928, and was never used until 1942, and without consideration of its history, and merely a superficial examination of its language, gave it an interpretation wholly at variance with its original meaning and construction by the territorial legislature and the courts, and its subsequent construction by the state legislature.

1. Construction of statutes under which bonds were issued.

Plainly the bonds involved in this case and the coupons attached thereto do not provide for call before maturity. (T. 15, 26). Beyond question both issues of bonds and coupons are in exact compliance with Chapter 2, Title 52, Revised Statutes of 1913 (See Exhibit L this brief. Also T. 5-9). After their form was determined they were ratified by acts of the legislature (T. 18-28). The argument is advanced, however, by the defendants and it has been sustained by the Supreme Court of Arizona that Chapter 1, Title 52, modifies Chapter 2, Title 52, so as to authorize the call of bonds issued under the last-named chapter. Specifically, the argument is that the following language in Section 5252, Arizona Revised Statutes of 1913,

“and for the purpose of paying, redeeming and refunding all or any part of the principal and interest of the existing and subsisting state legal indebtedness and also that which may at any time

become due or is now or may be hereafter authorized by law, the said commissioners shall from time to time issue negotiable coupon bonds of this state when the same can be issued at a lower rate of interest than previously paid on state indebtedness and to the profit and benefit of the state,"

authorizes the call of outstanding state bonds that have been issued with definite maturity dates, before their maturity, and the following words in Section 5260 Arizona Revised Statutes 1913,

"and said loan commissioners shall provide for the redeeming or refunding of the county, municipal and school district indebtedness upon the official demand of said authorities in the same manner as other state indebtedness now allowed or that may be hereafter allowed by law to said county municipality or school district upon official demand by said authorities,"

extends the authority of the state loan commissioners to the calling of county, municipal and school district bonds that have been issued with definite due dates before their maturity.

2. Origin of Chapter 1, Title 52, Revised Statutes of 1913.

The origin of this statute is revealed by an examination of Arizona territorial and state legislation and is established by the Supreme Court of Arizona in the case of *Maricopa County v. Osborn*, 136 Pac. (2nd) 270, 272 (adv) in which that court shows that Paragraph 2987 Arizona Revised Statutes 1887 though

extended by supplemental acts, ceased to operate in 1897, became a dead letter after statehood by reason of being in conflict with the provisions of the State Constitution, was rewritten as a new act in the Revised Code of 1928, and was never used until 1942, and without consideration of its history, and merely a superficial examination of its language, gave it an interpretation wholly at variance with its original meaning and construction by the territorial legislature and the courts, and its subsequent construction by the state legislature.

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long since repealed was continued in force by Section 5258, R. S. of 1913, which is a part of said Chapter 1, Title 52, by reason of the fact that it was adopted by reference by the Act of Congress of June 25, 1890, which later became said Chapter 1, Title 52.

a. Act of Congress of June 25, 1890, limited to existing bonds. (See Exhibit G, this Brief).

The meaning of the Act of Congress of June 25, 1890 was definitely understood when the act was adopted. It did not extend to the refunding of bonded indebtedness incurred after its date and ended with floating indebtedness incurred to December 31, 1890. (Arizona Revised Statutes, 1901, pages 104-109. See Exhibit G, this Brief.) By the Act of August 3, 1894, it was extended as to territorial warrants only, issued prior to December 31, 1895. (Arizona Revised Statutes, 1901, pages 109-110. See Exhibit H, this brief.) And by the Act of June 6, 1896, was extended to both territorial and county, municipal and school district indebtedness incurred up to January 1, 1897. (Gage vs. McCord, 5 Ariz. 227, 51 Pac. 977. See Exhibit I, this brief.) It never extended to any indebtedness of any kind incurred after the last mentioned date. The foregoing appears from the language of the acts of Congress, from reports of the committees recommending adoption of said act, (see Exhibits A, B, C and D attached to this brief,) and from the acts of the territorial legislature (see Act 79 Session Laws of 1891 and Act 33 Session Laws of 1895) and the decisions of the Supreme Court of the Territory.

Gage v. McCord, 5 Ariz. 227; 51 Pac. 977, 978.
 Schuerman v. Territory, 7 Ariz. 62; 60 Pac.
 895.

9. Act of Congress June 25, 1890 did not authorize call of bonds before maturity.

It was definitely understood that the Act of Congress of June 25, 1890, did not authorize the refunding of any bonds before their due dates unless they were voluntarily surrendered by the holders thereof. This appears from the report of of the committee of Congress and the official statement of Mr. Murphy, a former governor of Arizona, in his presentation to Congress, as an Arizona territorial delegate (see Exhibits "C" and "D" this brief). If there is otherwise any doubt as to the meaning of an act of Congress reference to the reports of the committee in charge of the legislation will be accepted as determining the question.

Binns v. U. S. 194, U. S. 486, 495, 48 L. ed.
 1087, 24 Sup. Ct. Rep. 816.

Wright v. Vinton Branch 300 U. S. 440, 463,
 81 L. ed. 736, 57 Sup. Ct. Rep. 556.

It is, therefore, clear that the Act of Congress of June 25, 1890, which afterwards became Chapter 1, Title 52, Revised Statutes of 1913, as it stood before Arizona became a state, did not authorize what the Supreme Court of Arizona has now held it did authorize in 1919 and 1921.

Maricopa County v. Osborn, 125 Pac. (2nd)
 703.

Thus the decision of the Supreme Court of Arizona must be erroneous unless the meaning of said Act of Congress of June 25, 1890 was changed in some manner before it became Chapter 1, Title 52, Revised Statutes of 1913. Said Act of June 25, 1890, became a law of the State of Arizona by virtue of Section 2, Article 22, of the state constitution insofar as it was not inconsistent with said constitution and as such law of the state it was subject to all interpretations it had theretofore received.

Mallory v. Pioneer Southwestern Stages, 54 Fed. (2nd) 559, 562,

Stevirmac Oil & Gas Co. v. Smith, 259 Fed. 650, 654,

Patterson v. Rousney, 159 Pac. 636, 639.

The interpretations placed upon said act before statehood have the same effect as interpretations placed thereon after statehood.

Frick Co. v. Oats, 94 Pac. 682, 686.

Said Chapter 1, Title 52, was thereafter enacted without change so far as the questions here involved are concerned as Chapter 29 of the first special session of the first legislature of the State of Arizona. Such re-enactment continued the statute with the meaning that had theretofore been attributed to it by the courts.

Heald v. District Court, 254 U. S. 20, 22, 65 Law ed. 106, 41 Sup. Ct. Rep. 42,

Johnson v. Manhattan R. Co., 289 U. S. 479,
77 L. ed. 1331, 1346, 53 Sup. Ct. Rep. 721,

Moore v. Chilson, 26 Ariz. 244, 254, 224 Pac.
818.

The same rule applies in case of executive or legislative construction.

National Lead Co. v. U. S., 252 U. S. 140, 64
L. ed. 497, 499, 40 Sup. Ct. Rep. 237,

U. S. v. Hermanos y Compania, 209, U. S. 337,
339, 52 Law ed. 821, 28 Sup. Ct. Rep. 532.

Thereafter the statute was made a part of the compilation known as the Revised Statutes of 1913. Its inclusion in said compilation under the authority of Chapter 64, third special session of the first legislature of the State of Arizona (Arizona Session Laws 2nd and 3rd Spec. Ses., 1st Leg. (1913) p. 17, second section) did not change its meaning for Section 7 of said act expressly provides the code commissioner shall have no power to change or modify any law, and the rule is well established that in the case of such a compiled code as distinguished from a revised code, the separate enactments retain the meanings and relative status they had before the compilation.

Waterman S. S. Co. v. Brill, 9 So. (2nd) 23,
27,

Southern Pac. Co. v. Gila County, 56 Ariz. 499,
503, 109 Pac. (2nd) 610,

Warner vs. Goltra,
 79 Law ed. 254, 259
 55 Sup. Ct. Rep. 46,

State v. Purcell, 228 Pac. 796 (Idaho),

Gembler v. Seward, 285 N. W. 542, 545
 (Neb.),

Paulson v. Hurlburt, 183 Pac. 937, 939 (Or.)
 The Supreme Court of Arizona has declared that the passage of the act along the course above mentioned did not have the effect of eliminating the long-forgotten Paragraph 2987 Revised Statutes of 1887, notwithstanding its repeal.

Maricopa County v. Osborn, 136 Pac. (2nd)
 270, 272 (Adv.)

We think it is clear from the foregoing that Chapter 1, Title 52, Revised Statutes of 1913, cannot be construed so as to authorize the call of plaintiffs' bonds before their maturity dates and that the Supreme Court of Arizona erred in so construing it in the first mandamus suit, it not being advised of the origin of the statute in that case.

c. Repeal by re-enactment of Chapter 2, Title 52.

Chapter 2, Title 52, Revised Statutes of 1913, was re-enacted in its entirety as Chapter 20 of the acts of the third special session of the first legislature of the State of Arizona (See Ariz.

Rev. Stat. 1913, Chap. II, Title 52). This undoubtedly was preparatory to its inclusion in the 1913 compilation. Chapter 1 of said Title 52 was not so re-enacted (See Marginal Notations, Ariz. Rev. Stat. 1913, Chap. I, Title 52). Thus, the two chapters went into the 1913 compilation with said Chapter 2 as the later enactment and undoubtedly repealing all provisions in said Chapter 1, the earlier enactment, which were inconsistent with said Chapter 2. Said Chapter 2 provided for the issuance of bonds with definite maturity dates and both in the title and the body of the act provided for the redemption of said bonds *after* but not before maturity, so any provision in said Chapter 1, providing for *redemption* before maturity, was unquestionably inconsistent with the provision in said Chapter 2, providing for *redemption* after maturity and was repealed by said chapter

City of Bisbee v. Cochise County, 44 Ariz. 233, 241, 36 Pac. (2nd) 557,

Biles v. Robey, 43 Ariz. 276, 281, 30 Pac. (2nd) 841,

Irvine v. Frohmiller, 58 Ariz. 391, 120 Pac. (2nd) 404.

Furthermore, there has been in the statutes of Arizona since an early date, a statute which was dropped out in 1901, but re-enacted in 1907, and again re-enacted by the first legislature of the state at the third special session, (Sec. 5553, Title 58 Revised Statutes 1913) just prior to the

adoption of Chapter 2, Title 52, a statute which declared that when a later statute covered a subject an earlier statute should not be deemed continued merely because it was consistent with the later statute but should be deemed abrogated and repealed. (See Sec. 5553 Revised Statutes of 1913). Under this provision certainly Chapter 2, Title 52, covering the subject of redemption of bonds and providing that redemption might be made after maturity, certainly repealed that part of Chapter 1, Title 52, which according to defendants' contention provided for redemption at any time.

Olson v. State, 36 Ariz. 294, 301, 285 Pac. 282,

Murphy v. Utter, 186 U. S. 95, 105, 46 Law ed. 1070, 22 Sup. Ct. Rep. 776,

District of Columbia v. Hutton, 143 U. S. 18, 27, 36 L. ed. 60, 12 Sup. Ct. Rep. 369,

Grant v. Baltimore & Ohio R. Co., 66 S. E. 709 (W. Va.),

Harris v. Cooley, 152 Pac. 300 (Cal.).

Chapter 64 of the Acts of the third special session of the first legislature providing for the compilation of all laws in force upon the adjournment of the third special session of the first legislature, expressly provided that the code commissioner should have no power to change the meaning of any of the laws (Sec. 7, Ariz. Ses. Laws 2nd and 3rd Spec. Ses., 1st Leg. (1913) Second Section). It is difficult to discover anything that

the first legislature of the State of Arizona might have done to make more clear its intention that the bonds to be issued under Chapter 2, Title 52, should not be impaired by anything contained in Chapter 1, Title 52.

3. Many other reasons exist why the refunding provided for by Chapter 1, Title 52, cannot be construed as authorizing the refunding of bonds issued under Chapter 2, Title 52. Among these are:

a. Chapter 1, Title 52, Revised Statutes of 1913, never did authorize the refunding of indebtedness to be created after the passage of the statute. The original Act of Congress of June 25, 1890, from which the language was derived, required the boards of supervisors to report their bonded and outstanding indebtedness, meaning existing indebtedness, and the subsequent words "and they shall issue bonds for any indebtedness * * * that may hereafter be allowed by law" meant indebtedness existing but not yet allowed when the act was passed. This is made clear by the proviso in Section 15 of the act to the effect that, "existing and outstanding indebtedness, together with such warrants as may be issued for the necessary and current expenses of carrying on territorial, county, municipal and school government for the year ending December 31, 1890, may also be funded and bonds issued for the redemption thereof," (see pages 108-109 Revised Statutes 1901).

The effect of the proviso was to extend not to

limit the language in the preceding section. The words, "allowed by law" had reference to allowance of claims by the boards of supervisors as found in the then existing statutes, providing for the government of counties.

Section 407 of the Revised Statutes of 1887 provided "no payment shall hereafter be made from the treasury of any of the counties of this territory unless the claim or demand shall be duly allowed according to the provisions of this act." The word, "allowed", is frequently used in the same sense in the succeeding sections which provide for the allowance of claims against the county.

A similar method for establishing school district indebtedness is provided for in Section 1495 Revised Statutes of 1887. The word "allowed" with reference to indebtedness retained the same meaning in the Revised Statutes of 1913, Sections 2433-2439 Revised Statutes of 1913. The code commissioner and legislature in preparing the 1928 Code unquestionably so understood the meaning of the word "allowed" and changed the same to "allowed to be incurred" so as to provide for the refunding of indebtedness to be incurred in the future (Sec. 2654 Revised Code 1928).

b. The intent of Congress in the Act of June 25, 1890, was clearly to reduce the high rate of interest on county indebtedness by permitting the same to be refunded as territorial indebtedness. It so appear from the committee report (Exhibit "A"). The act provided that bonds should

be issued by the loan commissioners as territorial bonds without limiting the obligation of the territory (see Pars. 2041, 2047, pages 104-106 Revised Statutes of 1901). The provision in Paragraph 2041 that the faith and credit of the territory is pledged to secure the bonds clearly applies to all the indebtedness, local as well as territorial, refunded under the act. Besides, there was an express provision that if there was not sufficient money in the interest fund the interest should be paid out of the general fund of the territory (Par. 2050). True, the act contemplated, and the territorial act passed to supplement the same (Act 79, page 97 Session Laws 1891) provided, that the local subdivisions should reimburse the state, but the faith and credit of the state was back of the bonds. That such was the proper interpretation of the act is shown by Paragraph 6th of Article 20 of the State Constitution which provided that all debts of the counties, valid and subsisting at the time of the passage of the Enabling Act, were assumed by the state, but the same constitution made it impossible for the state to assume any county indebtedness after statehood, for Section 5 of Article 9 of the state constitution absolutely prohibited the state from incurring any indebtedness except for certain limited purposes therein stated. The result was that if Section 5260 Revised Statutes of 1913 had authorized the refunding of county indebtedness by the state loan commissioners it would have been in violation of the state constitution. The code commissioner and legislature in 1928, realizing this changed the language of the act so as to pro-

vide that county bonds issued by the loan commissioners should not be secured by the faith and credit of the state and that the state should have no obligation thereon except to levy taxes in the counties and collect the same (Sec. 2654 Revised Code 1928).

c. Long continued construction of act should govern.

The long continued construction of the act from its adoption in 1890 down to 1942 is at variance with the construction contended for by defendants. Beginning with Section 15 of the Act of 1890 (Exhibit "F") and the extensions by the Acts of 1894 (Exhibit "G") and 1896 (Exhibit "H") the statements in the reports of the Congressional committees on those acts (Exhibits "A", "B", "C", "D") statement of Governor Murphy (Exhibit "D"), the fact that the territorial acts adopted in furtherance of intent to call bonds not voluntarily surrendered, the numerous acts passed between 1896 and statehood, providing for the issuance of optional bonds (Exhibit "E" in Appendix to this brief), which were all at variance with the interpretation contended for by defendants, and the fact that no attempt was made after statehood to refund unmatured bonds but other refunding acts were passed to provide for refunding only optional bonds (Chapt. 39 Session Laws 1927 and Chapters 74 and 75 Session Laws 1935), and the fact that Title 2, Chapter 52, and the chapter providing for the issuance of school district bonds where the indebtedness was less than 4% (Secs. 2736-2749 Revised Stat-

utes of 1913), all provided for definite due dates, the former providing for redemption of the bonds only after maturity, and the latter providing for a sinking fund to redeem on maturity, all show a construction of the act at variance with defendants' contention.

d. Subsequent legislative construction of act limits it to past due and optional bonds.

The fact that the legislature enacted Chapter 39 Session Laws of 1927 and Chapter 74 and Chapter 75 Session Laws of 1935, providing for the refunding of county, municipal and school district bonds and state bonds, respectively, only when they were callable, is clearly a subsequent legislative construction of the acts under which the bonds were issued to the effect that the provision in Chapter 1, Title 52, providing for refunding was not available to force the call of such bonds when they were not optional.

Moore v. Pleasant-Hassler Construction Co.,
51 Ariz. 40, 48, 76 Pac. (2nd) 225,

Alexander v. Mayor, 5 Cranch 1, 7, 3 Law ed.
19.

The case of Moore v. Pleasant-Hassler Construction Company, *supra*, is a definite decision by the Supreme Court of Arizona to the effect that where a subsequent act of the legislature shows what was the intent of the legislature in adopting a prior statute, such intent will be followed by the courts. It will be noted in this case

the meaning of the prior act was not drawn in question until after the subsequent acts of the legislature were passed so that this case comes under the dissenting as well as the majority opinion in the Pleasant-Hassler case.

e. Chapter 1, Title 52 applies to matured and optional bonds *only*.

It is plain that the language of Section 5260, Revised Statutes of 1913, independently considered by this court, ought not to be construed as having the drastic effect of permitting the call of plaintiffs' bonds before maturity. Inasmuch as this language is a verbatim reenactment of the Act of Congress of June 25, 1890, and must have the same meaning as the original statute, to give it that construction requires us to assume that Congress deliberately enacted an unconstitutional statute. The Act of Congress of June 25, 1890 applied only to bonds which were outstanding on the date of its enactment. Such a construction, therefore, requires us to assume that Congress intended to compel the holders of outstanding bonds, which were not redeemable prior to their maturity, to surrender their bonds for payment, which would make the act unconstitutional on the ground that it impaired the obligation of existing contracts. While Section 10 of Article I of the Federal Constitution does not apply to Congress, nevertheless such an act would be void as depriving the holders of the bonds of their property without due process of law.

Choate v. Trapp, 224 U. S. 665, 56 Law ed. 941,
32 Sup. Ct. Rep. 565,

Lynch v. United States, 292 U. S. 571, 78 L. ed. 1434, 54 Sup. Ct. Rep. 840.

Such an interpretation is unthinkable, and is manifestly contrary to the intent of Congress as is clearly shown by Exhibit D. If the Act of Congress of June 25, 1890 had no such intent, then, obviously, the same language had no such intent when it was reenacted verbatim by the first legislature of the State of Arizona.

Considered from the standpoint of the first legislature of the State of Arizona, defendants' construction requires us to assume that that legislature intended to make callable before the beginning of the option period, all of those bonds issued prior to statehood which had not yet reached the option period (See Exhibit E attached to this brief) and this clearly would render said act unconstitutional as impairing the obligation of the contract created by the issuance of those bonds. It is the rule in Arizona as well as elsewhere that where two constructions of an act are possible, one of which will render the act unconstitutional, that construction which renders it valid, will be adopted.

McManus v. Industrial Commission, 53 Ariz. 22, 28, 85 Pac. (2nd) 54,

Automatic R. M. Co. v. Pima Co., 36 Ariz. 367, 373, 285 Pac. 1034,

Prescott Courier, Inc. v. Moore, 35 Ariz. 26, 34, 274 Pac. 163.

State of Arizona, v. Hooker, 45 Ariz. 202, 206, 41 Pac. (2nd) 1091,

Stewart v. Robinson, 45 Ariz. 143, 150, 40 Pac. (2nd) 979,

Even if no constitutional question were involved the reasonable construction would be limit the refunding under Chapter 1, Title 52, to cases where the bonds were optional or past due or voluntarily surrendered by the holder. This was the construction arrived at by the Supreme Court of Missouri in the only case that we have found squarely upon the point.

State v. Smith, 96 S. W. (2nd) 348, 351 (Mo.)

f. Provisions of Chapter 1 not to be read into Chapter 2.

Ordinarily when an act or a chapter contains a complete procedure for the issuance of bonds and another act or chapter contains provisions for the issuance of different bonds, the provision of the latter act will not be applied to the former act for the presumption is that each of the acts were intended to be complete in themselves and the provisions of the one should not be read over into the other. Thus, in Arizona, there has existed side by side since 1913, the act providing for the issuance of bonds in excess of 4% which was applicable to school districts (Chapter 2, Title 52, Revised Statutes of 1913) and the act providing for the issuance of bonds by school districts for indebtedness less than 4% (Sections 2736-2749 Revised Statutes of 1913. It has never been contended that the provisions of one of these acts was applicable to bonds issued under

the other act, and the Supreme Court of Arizona has definitely held that such is not the case.

Armer vs. Wade, 48 Ariz. 1, 58 Pac. (2nd) 525
This principle is equally applicable to this case. The provisions of Chapter 1, Title 52, have no application to the provisions of Chapter 2, Title 52, because said Chapter 2 is complete in itself and there is nothing to indicate that the bonds therein provided for were to be added to or detracted from by statutes providing for other and different bonds. The principle is applied in other states as well as in the State of Arizona.

State v. Keith, 66 Pac. (2nd) 1059 (Okla.)

g. Section 5260, which is found in Chapter 1, Title 52, Revised Statutes of 1913, does not say that bonds of counties, municipalities and school districts shall be callable, nor does it say that they shall be refundable when the refunding bonds can be issued at a lower rate of interest or to the profit and benefit of the county. It merely says that:

“Said loan commissioners shall provide for the redeeming or refunding of the county, municipal and school district indebtedness upon the official demand of said authorities in the same manner as other state indebtedness and they shall issue bonds for any indebtedness now allowed or that may be hereafter allowed by law to said county, municipality or school district upon official demand by said authorities.”

Refunding "in the same manner" covers only the procedure for refunding and does not purport to give to the counties, municipalities or school districts the substantive right to issue notice and call the outstanding bonds.

Wilders S. S. Co. v. Low, 112 Fed. 161, 164.

It is a little absurd to say that under this general provision a small issue of school district bonds in a remote part of the state may be called by publishing a notice in the county where the state capital is situated.

h. *Bonds were ratified in form issued.*

After a contract for the 1919 issue of bonds had been entered into between the county and the purchasers, the legislature of the state adopted Chapter 54 Session Laws of 1921 (See Exhibit J this brief) which ratified these bonds and the contract for the purchase thereof (T. 18). The contract for the purchase specifically provided for the delivery of bonds running for the period of years mentioned in the resolution for their issuance, which was of record. The form of the bonds had been adopted by the board of supervisors long prior to the passage of this act and the bonds had been printed (T. 18). We think it is clear that it must be presumed that the legislature in ratifying these bonds and this contract knew what the bonds and the contract contained and they also must be presumed to have known what the law was, so when they ratified these bonds they made them valid as they stood, and that if there had been any variation between the bonds as issued and the law that variation was

eliminated, for it was the very intent and purpose of the act that these bonds should be made good as they stood.

Ryan v. Humphries, 150 Pac. 1106, 1108.

For the second issue of bonds there is a similar ratification by Act 86 of the 1921 Session Laws. (See Exhibit K this brief.) When this ratification act was passed these bonds had not been issued but the form had been adopted and had been made a matter of public record (T. 28). This act ratifies the bonds as they stand but there was at the time no contract of purchase. While the case is not as strong as in the case of the first issue, in that no purchase contract was ratified, we think here too that the legislature ratified the bonds as they stood.

III

The surrender of the bonds involved in this case as proposed by defendants, will constitute a breach of the trust created by the Arizona Enabling Act, which may be prevented by plaintiff as a citizen and taxpayer.

1. Plaintiff's right as a citizen and taxpayer to enforce the trusts created by the Enabling Act is established.

Rowlands v. State Loan Board,
24 Ariz. 116, 123,
207 Pac. 359.

Boyce v. Pima County,
24 Ariz. 259,
208 Pac. 419.

2. We have shown that this right may be enforced in the federal courts under the heading, "Statement of Jurisdiction", *supra*.

3. That the surrender of the bonds at a substantial loss as is proposed by the defendant, State Loan Commissioners, will constitute a breach of trust, is clear.

(a) It is the duty of the treasurer and other defendants constituting the State Loan Board, to resist the effort of Maricopa County, and the State Loan Commissioners to cause a loss to the state school fund by calling these non-callable bonds. In the *Restatement of the Law of Trusts*, Vol. 1 Section 178, page 456, the following rule is stated:

"The trustee is under a duty to the beneficiary to defend actions which may result in a loss to the trust estate, unless under all the circumstances it is reasonable not to make such defense.

See also, 2 Scott on Trusts, Section 178,
page 940.

In re, Trust Deeds of Smaltz, 17 Atl. (2d)
455, 457.

While it is true that a technical trust is not created by the Enabling Act, still the use of the terms, "trust" and "breach of trust", indicates that congress intended that the lands granted to the state, and the proceeds derived from the sale thereof, should be protected by the rules pertaining to trusts, and unquestionably, the state and every officer of the state, includ-

ing the supreme court of the state, can be prevented from causing a disposal of said lands and the proceeds derived therefrom in any manner not in strict accordance with the provisions of the Enabling Act.

Ervien v. U. S. 251 U. S. 41,
64 L. ed. 128,
40 Sup. Ct. Rep. 75.

(b) The Supreme Court of Arizona has held that legislation attempting to divert the proceeds of lands donated by the Enabling Act for other purposes however beneficent, is a violation of the trusts created by that Act. Said court holds that a legislative attempt to relieve mortgagors who had borrowed the school funds from the payment of interest on their mortgages violates Section 2, Article 10 of the State Constitution, which is the section adopting a portion of the Enabling Act above quoted. The court states the following:

“The interest and principal must be used for the specific purpose for which institutional lands were granted to the state or to the territory before it became a state. The legislature would have as much right to appropriate such funds or the interest thereon for road building purposes as it would have to give such fund away”.

Rowlands v. State Loan Board,
24 Ariz. 116, 207 Pac. 359.

It is clear that if the bonds held by the State Treasurer are not callable to surrender the same at their par value when a large premium was paid, based on the fact that they had yet a number of years to run and their actual value is greatly in excess of their

par value, is just as plainly a giving away of the trust funds as the attempt to forgive interest to the mortgagors condemned by the State Supreme court in *Rowlands v. State Loan Board*, supra.

(c) The same line of reasoning is followed by other courts in other states. The United States District Court, for the District of Idaho, held under similar provisions in the Idaho constitution, that the trusts created by the Enabling Act of that state prevented mortgages to secure loans of funds obtained from the sale of state school lands from becoming barred by the statute of limitations. The court says the following:

“As both the Admission Act and the State Constitution grants in trust public school lands, the proceeds from the sale thereof naturally remains as a part of the trust, and that the conditions are inviolable conditions which were accepted by the state. The state cannot violate these conditions nor dissipate such funds by enacting limitation acts providing recovery of the trust funds after a certain period, for it has not the power to accept such sacred and trust funds, and after loaning it out, by its act bar its recovery and the duty to recover it back upon the nonpayment of the loan.”

United States v. Fenton, 27 Fed. Sup.
816, 819.

We think it is clear that it is the duty of the federal courts to prevent not only the legislature of the state but the state Supreme Court as well, from violating the trusts created by the Enabling Act.

In *State v. Peterson*, 97 Pac. (2d) 603, 604, the Supreme Court of Idaho held that the title to state school lands held in trust under the Enabling Act would not be lost by adverse possession. The court says:

“Thus these public school endowment funds are trust funds of the highest and most sacred order, made so by Act of Congress and the Constitution”.

State v. Peterson, 97 Pac. (2d) 603, 604.

The Supreme Court of Arizona has in effect said the same thing in *Campbell v. Caldwell*, 20 Ariz. 377, 380; 181 Pac. 181, in which it is declared:

“The Constitution, Section 1, Article 10, makes the state a trustee of the lands granted to it by the federal government for the several purposes for which such lands are granted.”

We respectfully submit that the case must be considered by the federal courts on its merits, and upon such consideration judgment must be entered for plaintiff.

Respectfully submitted,

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II

cities, and school districts, are largely increased by the depreciated value of warrants and the high rate of interest they bear. The Territory and many of the counties have each year fallen a little behind the preceding year in meeting their expenses, and it is therefore an absolute necessity to afford them relief.

The committee believe that a Territorial bond, with the long time proposed and having the approval of Congress, can be sold at par, bearing a less rate of interest than can be sold in any other way, and thereby secure for the Territory the much-needed relief and the saving of \$100,000 annually.

The provisions of the bill for carrying the same into effect have been carefully considered by the committee and are found to be ample, and that, except to legalize the indebtedness, there is no responsibility attached to the United States.

The time within which indebtedness may be funded is placed at December 31, 1890, when the taxes are due and payable. From and after that date there will be cash on hand with which to meet the current expenses of the Territory.

The committee are unanimously of opinion that the Territory of Arizona is entitled to relief, and therefore report back the accompanying bill with amendment, and recommend that it do pass."

III

Exhibit B

CONGRESSIONAL RECORD—HOUSE

(July 20, 1894, page 7754)

FUNDING ACT OF ARIZONA

MR. CULBERSON. Mr. Speaker, I call up the bill (H. R. 6754) to amend section 15 of an act approving, with amendments, the funding act of Arizona, approved June 25, 1890.

The bill was read, as follows:

BE IT ENACTED, etc. That an act entitled "An act approving, with amendments, the funding act of Arizona," approved June 25, 1890, and paragraph 2052 (section 15) of said act, be, and the same is hereby amended by adding thereto as follows:

"Provided further, however, That the present outstanding warrants, certificates, and other evidences of indebtedness issued subsequent to December 31, 1890, for the necessary and current expenses of carrying on the Territorial government only, together with such warrants as may be issued for such purpose for the years ending December 31, 1894, and December 31, 1895, may also be funded and bonds issued for the redemption thereof; and thereafter no warrants, certificates, or other evidences of indebtedness shall be allowed to issue or be legal where the same is in excess of the limit prescribed by the Harrison Act."

II

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Sec. 2. That all acts or parts of acts in conflict with this act are hereby repealed.

MR. CULBERSON. I yield to the gentleman from Arizona.

MR. SMITH of Arizona. Mr. Speaker, this is simply a bill carrying to a further extent the funding act of Arizona, so as to prevent the payment of 10 per cent on outstanding warrants for the current expenses of the Territory. It is desired to fund them under the funding act until the collection of the taxes, so as to be able to start on a cash basis. This is purely a local matter extending our funding act, and the bill is unanimously reported from the Committee on the Judiciary.

MR. HUNTER. I see that it provides for extending the time up to 1895.

MR. SMITH of Arizona. Yes. That is, until the collection of taxes.

MR. HUNTER. But if the Territory should become a State in the meantime would not that have some effect on the provisions of this bill?

MR. SMITH of Arizona. It would not have any effect, for the debt would be bonded as it arose, and the limitation placed by the Territorial Legislature, which does not meet until February, 1895. The Legislature can provide then for everything that happens thereafter, and this is intended only to fix the time up to the meeting of the Territorial Legislature.

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The bill was ordered to be engrossed and read a third time; and being engrossed it, was accordingly read the third time, and passed.

On motion of MR. CULBERSON, a motion to reconsider the vote by which the bill was passed was laid on the table.

Exhibit C

CONGRESSIONAL RECORD—SENATE

(May 23, 1896, pages 5625 and 5626)

MR. PERKINS. I ask unanimous consent to call up the bill (S. 3161) amending and extending the provisions of an act of Congress entitled "An act approving with amendments the funding act of Arizona," approved June 25, 1890, and the act amendatory thereof and supplemental thereto, approved August 3, 1894.

There being no objection, the Senate, as in Committee of the Whole, proceeded to consider the bill.

MR. COCKRELL. When was that bill reported?

MR. WHITE. A very short time ago, I think.

MR. PERKINS. It was reported from the Committee on Territories yesterday.

MR. COCKRELL. The report has not been laid on my table.

MR. PERKINS. The report is printed, and the Secretary will read it for the Senator's information.

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MR. COCKRELL. I can understand much better when I have the report myself. Does the report explain the bill?

MR. PERKINS: I so understand. I will say that I introduced the measure more especially at the request of the Delegate from Arizona, and it is to correct some informality. The committee examined it very carefully, and from those who have stated the matter to me I learn it is a very proper measure.

MR. COCKRELL. Let the report be read.

THE VICE-PRESIDENT. The report will be read.

The Secretary read the following report, submitted by Mr. Davis May 22, 1896:

The Committee on Territories, to whom was referred Senate Bill 3161, having considered the same, hereby adopt House Report No. 1931 in support to a bill identical in tenor, and recommend the passage of Senate Bill aforesaid.

(House Report No. 1931, Fifty-fourth Congress, first session.)

The Committee on the Territories, to whom was referred House bill 8885, beg leave to submit the following report:

The act of Congress entitled "An act approving, with amendments, the funding act of Arizona" became a law June 25, 1890, and authorized the fund-

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ing of all Territorial, county, municipal, and school-district indebtedness of Arizona which had accrued and would accrue, with the interest thereon, until and including December 31, 1890, into 5 per cent bonds, and under the provisions of the act a loan commission, consisting of the governor, secretary of the Territory, and Territorial auditor, was created to fund indebtedness under the terms of the act.

The purpose of the law was to effect an annual saving in interest and place the Territory upon a cash basis. The floating indebtedness of the territory represented by warrants bore 10 per cent interest, and upon that indebtedness an immediate saving was had of 5 per cent. The average rate of interest on the bonded indebtedness of the Territory was 8 per cent, and the operation of the law effected a saving of 3 per cent upon all indebtedness funded. Only such bonded indebtedness could be funded as had matured or was voluntarily surrendered by the holders thereof.

A supplemental act of Congress was passed and approved August 3, 1894, extending the time for funding outstanding warrants for Territorial expenses only until December 31, 1895. The object of the present bill is to further extend the provisions of the funding act approved June 25, 1890, until January 1, 1897, so as to permit and authorize the funding of such outstanding indebtedness as might have been funded under the original act had the same been surrendered before the act had lapsed.

It is not proposed to fund any indebtddness which

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could not have been funded under the original act had said indebtedness been presented in time.

No new indebtedness is proposed to be funded in excess of the limit prescribed by law. In authorizing the funding of the outstanding liabilities the act also validates the indebtedness already funded and authorized to be funded, so as to prevent the possibility of repudiation of bona fide obligations.

The eighteenth legislature of Arizona unanimously memorialized Congress to validate securities about which doubt existed.

Upon investigation the committee believe the legislation beneficial and wise and in the interest of good government, and therefore recommend the passage of the bill.

The bill was reported to the Senate without amendment, ordered to be engrossed for a third reading, read the third time, and passed.

Exhibit D

CONGRESSIONAL RECORD—HOUSE

(June 1, 1896, page 5968)

MR. MURPHY of Arizona. Mr. Speaker, I move to suspend the rules and pass the Senate bill which I send to the desk.

The bill was read, as follows:

BE IT ENACTED, etc., That the provisions of

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the acts of Congress approved June 25, 1890, and August 3, 1894, authorizing the funding of certain indebtedness of the Territory of Arizona, are hereby amended and extended so as to authorize the funding of all outstanding obligations of said Territory, and the counties, municipalities, and school districts thereof, as provided in the act of Congress approved June 25, 1890, until January 1, 1897, and all outstanding bonds, warrants, and other evidences of indebtedness of the Territory of Arizona, and the counties, municipalities, and school districts thereof, heretofore authorized by legislative enactments of said Territory bearing a higher rate of interest than is authorized by the aforesaid funding act approved June 25, 1890, and which said bonds, warrants, and other evidences of indebtedness have been sold or exchanged in good faith in compliance with the terms of the acts of the legislature by which they were authorized, shall be funded, with the interest thereon which has accrued and may accrue until funded into the lower interest-bearing bonds as provided by this act.

Sec. 2. That all bonds and other evidences of indebtedness heretofore funded by the loan commission of Arizona under the provisions of the act of Congress approved June 25, 1890, and the act amendatory thereof and supplemental thereto approved August 3, 1894, are hereby declared to be valid and legal for the purposes for which they were issued and funded, and all bonds and other evidences of indebtedness heretofore issued under the authority of the legislature of said Territory, as hereinbefore authorized to be funded, are hereby confirmed, approved, and validated, and may be funded as in this act pro-

X

vided until January 1, 1897; Provided, That nothing in this act shall be so construed as to make the Government of the United States liable or responsible for the payment of any of said bonds, warrants, or other evidences of indebtedness by this act approved, confirmed, and made valid, and authorized to be funded.

The SPEAKER pro tempore. Is a second demanded?

MR. HEPBURN. I demand a second.

MR. MURPHY of Arizona. I ask unanimous consent that a second be considered as ordered.

MR. KEM. I object.

Tellers being ordered upon the question of ordering a second, the House divided; and the tellers reported—ayes 80, noes 1.

So a second was ordered.

MR. MURPHY of Arizona. Now, Mr. Speaker, I ask that the report upon this bill be read. It is a unanimous report and explains the object of the bill clearly.

The report (by Mr. Harris) was read, as follows:

The Committee on the Territories, to whom was referred House bill 8885, beg leave to submit the following report:

The act of Congress entitled "An act approving,

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with amendments, the funding act of Arizona" became a law June 25, 1890, and authorized the funding of all Territorial, county, municipal, and school district indebtedness of Arizona which had accrued and would accrue, with the interest thereon, until and including December 31, 1890, into 5 per cent bonds, and under the provisions of the act a loan commission, consisting of the governor, secretary of the Territory, and Territorial auditor, was created to fund indebtednesses under the terms of the act.

The purpose of the law was to effect an annual saving in interest and place the Territory upon a cash basis. The floating indebtedness of the Territory represented by warrants bore 10 per cent interest, and upon that indebtedness an immediate saving was had of 5 per cent. The average rate of interest on the bonded indebtedness of the Territory was 8 per cent, and the operation of the law affected a saving of 3 per cent upon all indebtedness funded. Only such bonded indebtedness could be funded as had matured or was voluntarily surrendered by the holders thereof.

A supplemental act of Congress was passed and approved August 3, 1894, extending the time for funding outstanding warrants for Territorial expenses only until December 31, 1895. The object of the present bill is to further extend the provisions of the funding act approved June 25, 1890, until January 1, 1897, so as to permit and authorize the funding of such outstanding indebtedness as might have been funded under the original act had the same been surrendered before the act had lapsed.

It is not proposed to fund any indebtedness which

XII

could not have been funded under the original act had said indebtedness been presented in time.

No new indebtedness is proposed to be funded in excess of the limit prescribed by law. In authorizing the funding of the outstanding liabilities the act also validates the indebtedness already funded and authorized to be funded, so as to prevent the possibility of repudiation of bona fide obligations.

The eighteenth legislature of Arizona unanimously memorialized Congress to validate securities about which doubt existed.

Upon investigation the committee believes the legislation beneficial and wise and in the interest of good government, and therefore recommend the passage of the bill.

MR. MURPHY of Arizona. I reserve the balance of my time, unless some gentleman desires to ask questions.

MR. HOPKINS. Mr. Speaker, I think it is quite important that the gentleman should explain the provisions of this bill somewhat.

Mr. MURPHY of Arizona. I supposed that the report explained it sufficiently, but if the gentleman thinks it does not I will gladly supplement it with a brief explantain. Under the working of the act of Congress approved June 25, 1890, the Territory of Arizona was authorized to fund all its indebtedness of whatever nature into 5 per cent bonds, thereby effecting an average saving of 3 per cent upon its

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indebtedness. That law applied to all kinds of indebtedness—school district, Territorial, county, and municipal.

A commission was organized under the act, consisting of the governor, the secretary, and the Territorial auditor, for the purpose of executing the law, but of course the outstanding indebtedness bearing a higher rate of interest could not be compelled to be surrendered or funded unless it had matured, and therefore there still remained a considerable portion which could not be funded. Many obligations were about to mature, and they were funded. A portion of the 8 per cent indebtedness was funded, but some of the higher interest-bearing bonds of counties and municipalities were refused to be surrendered for funding. The expectation was to put the Territory upon a cash basis, but that expectation was disappointed, and the members of the Territorial government came here and asked the last Congress to extend the funding act for a year longer, covering the floating indebtedness and the Territorial expenses only, but not including the outstanding indebtedness of municipalities bearing a higher rate of interest. That act was passed August 3, 1894.

A question was raised here this morning about a cloud being on Territorial bonds, and a bill was passed validating certain bonds of New Mexico. A large amount of the bonds of Arizona might possibly give rise to the same questions if our people desired to repudiate their obligations, but there is no such desire on their part, and the Territorial legislatures, recognizing the danger to the credit of the Territory

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if anyone should undertake to litigate these securities, have unanimously memorialized Congress to pass this act to validate both the bonds which have been funded and others outstanding, bearing a higher rate of interest, upon their voluntary surrender by their holders. There is about \$200,000 involved altogether. I will ask the Clerk to read the memorial of the legislature, if the gentleman desires.

MR. HOPKINS. That is not necessary.

MR. JOHNSON of North Dakota. I wish to ask the gentleman whether there is anything in the act of 1890 safeguarding these bonds against being sold for less than par?

MR. MURPHY of Arizona. Yes, sir; they can not be so sold.

MR. JOHNSON of North Dakota. I do not see any provision of that kind in the bill.

MR. MURPHY of Arizona. Well, this bill refers to the provisions of the other act, which prohibits the selling of the bonds for less than par.

MR. JOHNSON of North Dakota. What arrangement is there for securing a premium on the bonds, provided the market should warrant it?

MR. MURPHY of Arizona. The Territorial officers constituting the loan commission are required, under the provisions of the act, to advertise for bids.

MR. JOHNSON of North Dakota. What experi-

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ence have you had on that subject since the act of 1890?

MR. MURPHY of Arizona. Bonds to the amount of \$500,000 were sold at a premium, bringing 102.

MR. JOHNSON of North Dakota. The bonds, as I understand, which were sold under the act of 1894 were gold bonds; that is, the interest was payable in gold.

MR. MURPHY of Arizona. Yes, sir; and the principal in lawful money.

MR. JOHNSON of North Dakota. And the same requirement applies with regard to these bonds?

MR. MURPHY of Arizona. Yes, sir.

MR. McCORMICK. Will this issue of bonds cover the entire indebtedness of the Territory?

MR. MURPHY of Arizona. Yes, sir; the entire indebtedness of the Territory may be funded under this act.

MR. JOHNSON of North Dakota. Will this bill, if it becomes a law, have the effect of validating any bonds which are now questionable?

MR. MURPHY of Arizona. Yes, sir; to a certain degree. None of the bonds have been repudiated by the Territory, but there is a cloud to a certain extent resting upon some of them.

MR. HEPBURN. This indebtedness, or the

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larger part of it, was incurred, I believe, while a statute of the United States forbidding the Territory from issuing bonds was in force?

MR. MURPHY of Arizona. Oh, no; only a very small portion of it—about \$200,000.

MR. HEPBURN. What is the total amount that has been funded or may be funded under this act—the total amount of indebtedness of the Territory?

MR. MURPHY of Arizona. Probably less than \$2,000,000. I funded \$1,600,000 while I was governor. The aggregate I have named covers not simply debts of the Territory proper, but indebtedness of cities, counties, townships, and school districts. No one would call the debt of New York City the debt of New York. The amount of indebtednesses I have named includes every kind of obligation of the Territory proper and the indebtedness of municipalities, school districts, etc.; and the funding of this debt will save us on the average 3 per cent interest.

MR. HEPBURN. What portion of the \$2,000,000 of indebtedness has been or will be incurred in the refunding of bonds of the prohibited class of which we have been speaking?

MR. HILBORN. The Pima claims?

MR. MURPHY of Arizona. None of the Pima claims; but of obligations similar to those, about \$200,000.

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MR. HEPBURN. I am willing to yield the floor to any gentleman who wants to speak on this subject. (Cries of "Vote!" "Vote!")

The question was taken; and the motion to suspend the rules and pass the bill was agreed to, two-thirds voting in favor thereof.

Exhibit E

Act 9, page 38, Session Laws of 1897, approved March 8, 1897, authorized the issuance of \$100,000.00 of territorial bonds for the erection of the capitol building, such bonds to be payable absolutely in fifty years from their date, the territory to have the right to pay them at any time after twenty years from their date.

Act 47, approved March 19, 1903, page 75, Session Laws of 1903, authorized the issuance of bonds to provide for improvements and publications of the Agricultural Experiment Station of the University and establishing farmers' institutes and short courses. The bonds were made payable within twenty years from the date of their issuance. This act provided for a sinking fund, and further provided that whenever, "after the expiration of ten years from the issuance of any bonds under this act there remains, after the payment of the interest as provided in this section, a surplus of \$1,000.00 or more, it shall be the duty of the territorial treasurer to advertise for the retirement of the bonds. Clearly, these bonds were authorized to be optional for the period between ten and twenty years after their date of issuance.

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Act 73, approved March 19, 1903, page 127 Session Laws of 1903, authorized the issuance of \$100,000.00 of bonds for the purpose of making improvements to the territorial asylum. These bonds were required to be payable fifty years after date. A sinking fund was provided for and Section 8 of said act contained the following provisions:

“Whenever, after the expiration of twenty-five years from the date of issuance of any bond under this act there shall be in the sinking fund for the redemption of the bonds for the territorial asylum for the insane, the sum of \$2,500.00 or more, it shall be the duty of the territorial treasurer to advertise,” for the retirement of said bonds. Clearly, these bonds were optional during the period between twenty-five years and fifty years after their date of issuance.

In 1905, the legislature authorized Apache County to raise money for the purpose of building a court house, in the amount of \$15,000.00, payable thirty years from the date of issuance, providing a sinking fund beginning with the year 1925, which should be sufficient each year after that date to pay \$1500.00 upon the principal of said bonds. Chapter 6, page 5, Session Laws of 1905.

Likewise, in the year 1905, the legislature passed an act authorizing Gila County to issue \$40,000.00 of bonds for court house and jail, payable in thirty years, with an option on the part of the county to pay any or all of them after ten years after the date of their issuance. Chapter 9, page 12, Sessions Laws of 1905.

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Likewise, in 1905, the legislature passed an act authorizing Mohave County to issue \$20,000.00 bonds for the purpose of building a court house, said bonds to be payable thirty years from the date of their issuance, and providing for a sinking fund beginning in the year 1925, and that each year thereafter a tax of \$2000.00 per year should be levied to retire said bonds. Chapter 57, page 112, Session Laws of 1905.

Likewise, in 1905, the legislature passed an act providing for the issuance of \$19,000.00 of bonds for the repair of the territorial bridge across the Gila, at Florence, said bonds to be payable at the end of fifty years and to be optional twenty-five years after their issuance. Chapter 58, page 117, Session Laws of 1905.

Likewise, in 1905, the legislature passed an act for the issuance of \$40,000.00 bonds for additional buildings and equipment at the territorial prison, said bonds to be payable fifty years after date and to be redeemable after twenty-five years from the date of 1905.

Likewise in 1905, the legislature passed an act authorizing the county of Mohave to issue bonds for \$10,000.00 for the construction and furnishing of a jail, said bonds to be payable in twenty years, with an option on the part of the county to pay any or all of them after ten years from the date of issuance.

Act 61, page 129, Session Laws of 1905.

In 1907, the legislature passed an act authoriz-

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ing Gila County to issue \$25,000.00 bonds for the completion of the court house and jail, said bonds to be payable in twenty years, with option on the part of the county to pay any or all of them after eight years from the date of their issuance.

Chapter 17, page 16, Session Laws, 1907.

In 1909, the legislature passed an act authorizing Mohave County to issue bonds for building a court house in the amount of \$30,000.00, payable thirty years after date, and providing for a sinking fund and that in the year 1929 and each year thereafter until the year 1939, the county should levy and collect a tax sufficient to pay \$3,000.00 upon the principal of said bonds, and when the sum of \$5,000.00 should be in the redemption of said bonds. Chapter 17, page 34, Session Laws of 1909.

Exhibit F

Title 52

Chapter I

Funding and Refunding

5251. For the purpose of liquidating and providing for the payment of the outstanding and existing indebtedness of the State of Arizona, or of the Territory of Arizona assumed by the State of Arizona, and such future indebtedness as may be or is now authorized by law, the governor of the said state, together with the state auditor and state treasurer,

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and their successors in office shall constitute a board of commissioners, to be styled the Loan Commissioners of the State of Arizona, and shall have and exercise the powers and perform the duties hereinafter provided.

Marginal Notations: Loan Commissioners, Ch. 29, Sec. 1, Laws 1912, 1st Sp. Sess.

5252. It shall be and is hereby declared the duty of the said loan commissioners to provide for the payment of the existing state indebtedness due, and to become due, or that is now or may hereafter be authorized by law; and for the purpose of paying, redeeming, and refunding all or any part of the principal and interest of the existing and subsisting state legal indebtedness, and also that which may at any time become due, or is now or may be hereafter authorized by law, the said commissioners shall, from time to time, issue negotiable coupon bonds of this state when the same can be issued at a lower rate of interest than previously paid on state indebtedness and to the profit and benefit of the state.

5253. Said bonds shall be issued as nearly as practicable in denominations of one thousand dollars, but bonds of a lower denomination, of not less than one hundred dollars may be issued when necessary. Said bonds shall bear interest at a rate to be fixed by said loan commissioners but in no case to exceed five per centum per annum, which interest shall be paid in gold coin or its equivalent in lawful money of the United States, on the 15th day of January and

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July in each year, at the office of the state treasurer or some bank or trust company in the City of New York at the option of the purchaser of said bonds, the place of payment being mentioned in said bonds. The principal of said bonds shall be made payable in lawful money of the United States within twenty-five years after date of their issue. The state reserves the right to redeem at par any of said bonds in their numerical order at any time after fifteen years after the date thereof. They shall bear the date of their issue, state when, where, and to whom payable; rate of interest, and when and where such interest is payable; shall be signed by said loan commissioners; shall have the seal of the state affixed thereto; shall be countersigned by the state treasurer and bear his official seal, and shall be registered by the state auditor in a book to be kept by him for that purpose, which record shall show amount sold for, or if exchanged, for what exchanged; and the faith and credit of the state is hereby pledged for the payment of said bonds and the interest accruing thereon as herein provided.

Marginal Notations: Issuance of refunding bonds, Sec. 3, id., Am. Ch. 2, Laws 1913, 2nd Sp. Sess.

5254. Coupons for the interest shall be attached to each bond, so that they may be removed without injury to, or mutilation of such bond.

They shall be consecutively numbered and bear the same number of the bond to which they are attached, and shall be signed by the state treasurer.

The said coupons shall cover the interest expressed

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in said bond from the date of issue until paid; but in no case shall bonds bear interest, nor shall interest be paid thereon for any time before their delivery to the purchaser, as hereinafter provided.

Marginal Notations: Interest coupons, Sec. 4, id., Ch. 29, Laws 1912, 1st Sp. Sess.

5255. Whenever the said loan commissioners may be authorized by law to issue bonds, or shall have decided to refund or redeem all or any part of the existing indebtedness of this state they shall direct the state treasurer to advertise for a sale of the bonds to be issued for that purpose, by causing a notice of such sale to be published once a week for the period of one month in three newspapers published in the state, no two of which shall be published in the same county, and they may further direct the state treasurer, if in their opinion such action is desirable, to advertise as hereinbefore mentioned by at least one insertion in a publication published in the City of New York, in the State of New York, and in one in the City of San Francisco, in the State of California; such notice shall specify the amount of bonds to be sold, the place, day, and hour of sale, and that bids will be received by said treasurer for the purchase of said bonds within one month from the expiration of said publication; and at the place and time named in said notice the said treasurer and loan commissioners shall open all bids received by him and shall award the purchase of said bonds, or any part thereof, to the bidder or bidders making the best offer therefor; provided, that said loan commissioners shall have the right to reject any and all bids; and provided, further, that they may refuse to make any award unless sufficient security

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shall be furnished by the bidder or bidders for the compliance with the terms of their bids.

Marginal Notation: Sale of bonds, Sec. 5, id.

5256. When the sale of said bonds shall be awarded by the loan commissioners, they shall provide and procure the necessary bonds, and any expense incurred by them therefor, for the publication of said notices, cost of remitting funds for the payment of interest or money on said bonds, and all necessary incidental expenses shall be paid out of the general fund of the state, upon the order of the state auditor, countersigned by the governor; and a sum of money sufficient to cover said costs and expenses is hereby appropriated out of said fund.

They shall, from time to time after signing said bonds, deliver them to the state Treasurer, taking his receipt therefor, and charge him therewith.

Marginal Notation: Cost of sale, Sec. 6, id.

5257. The state treasurer shall sell said bonds for cash, or exchange them for any of the indebtedness for the redemption of which they were so issued, but in no case shall said bonds be sold or exchanged for less than their face or par value and the accrued interest at the time of disposal, nor must any indebtedness be redeemed at more than its face value and any interest that may be due thereon.

The treasurer shall endorse by writing or stamping in ink on the face of the paper evidencing the indebtedness received by him in exchange for said bonds.

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the time when and the amount for which exchanged.

Marginal Notation: Sale or exchange of bonds, Sec. 7, id.

5258. Moneys received by the treasurer shall be applied by him to the redemption of the indebtedness for the redemption of which bonds were issued, and the treasurer shall give notice, as is provided by law in case of payment and redemption of state warrants, of his readiness to redeem such indebtedness and thereafter interest on all such indebtedness due and outstanding shall cease.

Before any such indebtedness shall be paid, the state auditor shall endorse on each certificate the amount due thereon, and shall write across the face of each the date of its surrender and the name of the person surrendering, and shall keep proper record thereof.

Marginal Notations: Application of proceeds, Sec. 8, id.

5259. There shall be levied annually upon the taxable property in this state, and in addition to the levy for other authorized taxes, a sufficient sum to pay the interest on all bonds issued and disposed of hereunder, to be placed in the state treasury, in the fund to be known as the "Interest Fund." And each year after such bonds shall have been issued such additional amount shall be levied annually as will pay four per cent of the total amount issued until all the bonds issued hereunder are paid and discharged.

The state board of equalization, or, on their failure,

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the state auditor, shall determine the rate of tax to be levied in the different counties in the state to carry out the provisions of this section, and shall certify the same to the board of supervisors, in each county and to the municipal or school authorities; and the said board of supervisors, or authorities, are hereby directed and required to enter such rate on their assessment rolls in the same manner and with the same effect as is provided by law in relation to other state, county, municipal, and school taxes. Every tax levied under the provisions or authority of this section shall be a lien against the property assessed.

All moneys derived from taxes authorized by this section shall be paid into the state treasury, and shall be applied:

First. To the payment of the interest on the bonds issued hereunder.

Second. To the payment of the principal of such bonds;

Provided, that all moneys remaining in the interest fund after the payment of the interest and all moneys remaining in the "redemption fund" after all of said bonds shall have been paid and discharged, shall be transferred by the state treasurer to the state "general fund".

Marginal Notations: Tax levy, Sec. 9, id.

5260. Whenever, after the expiration of the fifteen years from the date of issuance of any bonds under this chapter, there remains after the payment

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of the interest, as provided in the preceding section, a surplus of ten thousand dollars or more, it shall be the duty of the state treasurer to advertise, as in the manner of advertising by the loan commissioners for bids for sale of bonds, which advertisement shall state the amount of moneys in the said redemption fund, and the number of bonds, numbering them in the order of their issuance, commencing at the lowest number then outstanding, which said fund is set apart to pay and discharge; and if such bonds so numbered in such advertisements shall not be presented for payment and cancellation at the expiration of such publication, then such fund shall remain in the treasury to discharge such bonds whenever presented, but they shall draw no interest after the expiration of such publication. Before any such bonds shall be paid they shall be presented to the state auditor, who shall endorse on each bond the amount due thereon, and shall write across the face of each bond the date of its surrender and the name of the person surrendering. The state auditor shall keep a record of all bonds issued and disposed of by the state treasurer, showing their number, rate of interest, date and amount of sale, when, where, and to whom, payable, and if exchanged, for what, and when presented for redemption the date, amount due thereon, and person surrendering. The boards of supervisors of the counties, the municipal and school authorities, are hereby authorized and directed to report to the loan commissioners of the state their bonded and outstanding indebtedness, and said loan commissioners may, on written demand, require an official report from the board of supervisors of counties, the municipal or school authorities, of their bonded and outstanding indebtedness, and said loan

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commissioners shall provide for the redeeming or refunding of the county, municipal and school district indebtedness, upon the official demand of said authorities, in the same manner as other state indebtedness, and they shall issue bonds for any indebtedness now allowed, or that may be hereafter allowed by law, to said county, municipality, or school district upon official demand by said authorities. The county, municipality, or school district shall pay into the state treasury, in addition to all other taxes authorized by law, such amounts as may be directed by the state board of equalization, or on their failure by the state auditor, to be levied for the payment of the principal of such bonds issued in redemption, or refunding, or of other bonds issued to such county, municipality, or school district, as herein provided, in the same manner as is herein provided for the payment of the principal and interest of state indebtedness, and, in addition, the interest paid by the state on such bonds.

Marginal Notation: Redemption of bonds, Sec, 10, id.

5261. When the treasurer pays or redeems any indebtedness he shall endorse, by writing or stamping in ink, on the face of the paper evidencing such indebtedness so paid or redeemed, the words "redeemed and cancelled" with the date of cancellation. He shall keep a full and particular account and record of all his proceedings of the bonds redeemed and surrendered, and he shall transmit to the governor an abstract of all his proceedings with his annual report, to be by the governor laid before the legislature at its

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meeting. All books and papers pertaining to the issuance and payment of bonds and interest thereon shall at all times be open to the inspection of the party interested, or to the governor, or committee of either branch of the legislature, or a joint committee of both.

Marginal Notation: Cancellation of redeemed bonds, Sec. 11, id.

5262. It shall be the duty of the state treasurer to pay the interest on said bonds when the same falls due out of the said interest fund, if sufficient; and if said fund be not sufficient, then to pay the deficiency out of the general fund; provided, that the state auditor shall first draw his warrant on the state treasurer, payable to the order of said treasurer, for the amount of such deficiency, out of the general fund.

Marginal Notation: Payment of interest, Sec. 12, id.

5263. It shall be the duty of said loan commissioners to make a full report of all their proceedings to the governor on or before the first day of January of each year, and said reports shall be transmitted by the governor to the State legislature.

Marginal Notation: Report of loan commissioners, Sec. 13, id.

5264. No bond issued under the provisions of this chapter shall be taxed within this state.

Marginal Notation: Bonds not taxable, Sec. 14, id.

5265. Whenever the owner of any coupon bond

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issued pursuant to the provisions of this chapter shall present such bond to the state auditor with a request for the conversion of such bond into a registered bond, the state auditor shall cut off and cancel the coupons of any such coupon bond so presented and shall stamp, print or write upon such bond so presented, either upon the back or the face thereof, as may be convenient, a statement to the effect that the said bond is registered in the name of the owner and that, thereafter, the interest and principal of said bond are payable to the registered owner. Thereafter and from time to time, any such bond may be transferred by such registered owner in person or by attorney duly authorized, on presentation of such bond to the state auditor and the bond again registered as before, a similar statement being stamped, printed or written upon any such bond may be substantially in the following form:

(Date: giving month, year and day.)

This bond is registered pursuant to the statutes in such case made and provided in the name of.....
....., and the interest and principal thereof are hereafter payable to such owner.

.....
State Auditor.

If any bond shall have been registered as aforesaid, the principal and interest of such bond shall be payable to the registered owner. The state auditor shall enter in the register of said bonds kept by him pursuant to the provisions of this chapter, or in a sep-

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and in whose name respectively, so that said register or book shall at all times show what bonds are registered and the name of the registered owner thereof.

Marginal Notation: Registration of bonds, Ch. 50, Laws 1913, 2nd Sp. Sess.

Exhibit G

(Chap. 614, 51st Cong. 1st Sess., June 25, 1890.)

BE IT ENACTED, etc., That the act of the Revised Statutes of Arizona of eighteen hundred and eighty-seven, known as "Title XXXI—Funding," be and is hereby, amended so as to read as follows, and that as amended the same is hereby approved and confirmed, subject to future territorial legislation:

Marginal Notation: Arizona funding act amended and approved.

TITLE XXXI—FUNDING AND LOAN

Chapter One

"Territorial, County, Municipal, and School District

Indebtedness.

"Par. 2039. (Sec. 1). For the purpose of liquidating and providing for the payment of the outstanding and existing indebtedness of the territory of Arizona and such future indebtedness as may be or is now authorized by law, the governor of the said territory together with the territorial auditor and territorial secretary, and their successors in office, shall con-

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stitute a board of commissioners, to be styled the loan commissioners of the Territory of Arizona, and shall have and exercise the powers and perform the duties hereinafter provided.

Marginal Notation: Board of loan commissioners constituted.

“Par. 2040. (Sec. 2.) It shall be, and is hereby, declared the duty of the loan commissioners to provide for the payment of the existing territorial indebtedness due, and to become due, or that is now, or may be hereafter, authorized by law and for the purpose of paying, redeeming, and refunding all or any part of the principal and interest, or either of the existing and subsisting territorial legal indebtedness, and also that which may at any time become due, or is now or may be hereafter authorized by law, the said commissioners shall, from time to time, issue negotiable coupon bonds of this territory when the same can be done at a lower rate of interest and to the profit and benefit of the territory.

Marginal Notations: Duty of loan commissioners issue of negotiable coupon bonds.

“Par. 2041. (Sec. 3.) Said bonds shall be issued as near as practicable in denominations of one thousand dollars, but bonds of a lower denomination, not less than two hundred and fifty dollars, may be issued when necessary. Said bonds shall bear interest at a rate to be fixed by said loan commissioners, but in no case to exceed five per centum per annum, which interest shall be paid in gold coin, or its equivalent in

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lawful money of the United States, on the fifteenth day of January in each year, at the office of the territorial treasurer, or at such bank in the city of New York, in the state of New York, or in the city of San Francisco, in the State of California, or such place as may be designated by said loan commissioners, at the option of the purchaser of said bonds, the place of payment being mentioned in said bonds. The principal of said bonds shall be made payable in lawful money of the United States fifty years after the date of their issue. Said territory reserves the right to redeem at par any of said bonds, in their numerical order, at any time after twenty years after the date thereof.

Marginal Notations: Denominations of bonds. Interest. Maximum. Where payable, etc. Payment of principal. Reserved rights of redemption.

“They shall bear the date of their issue, state when, where, and to whom payable, rate of interest, and when and where payable, and shall be signed by said loan commissioners, and shall have the seal of the territory affixed thereto, and countersigned by the territorial treasurer, and bear his official seal, and shall be registered by the territorial auditor in a book to be kept by him for the purpose, which shall state amount sold for, or, if exchanged, for what; and the faith and credit of the territory is hereby pledged for the payment of said bonds and the interest accruing thereon, as herein provided.

Marginal Notations: Form of bonds. Signed, etc. Sealed. Registered. Pledge of payment.

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“Par. 2042. (Sec. 4.) Coupons for the interest shall be attached to each bond, so that they may be removed without injury to or mutilation of bond.

Marginal Notation: Interest Coupons.

They shall be consecutively numbered and bear the same number of the bond to which they are attached, and shall be signed by the territorial treasurer.

Marginal Notation: Consecutive number, etc.

“The said coupons shall cover the interest expressed in said bond from the date of issue until paid; but in no case shall bonds bear interest, nor shall any interest be paid thereon for any time before their delivery to the purchaser, as hereinafter provided.

Marginal Notation: Interest. Limitation.

“Par. 2043. (Sec. 5.) Whenever the said loan commissioners may be authorized by law to issue bonds, or shall have decided to refund or redeem all or any part of the existing indebtedness of this territory, they shall direct the territorial treasurer to advertise for a sale of the bonds to be issued for that purpose, by causing a notice of such sale to be published for the period of one month in some daily newspaper published at the capital of the territory, and at least one insertion in a newspaper published in the city of New York, in the state of New York, and in the City of San Francisco, in the state of California; such notice shall specify the amount of bonds to be sold, the place, day, and hour of sale, and that bids will be received by said treasurer for the purchase of said bonds within one month from the expiration of said

publication; and at the place and time named in said notice, the said treasurer and loan commissioners shall open all bids received by him and shall award the purchase of said bonds, or any part thereof to the bidder or bidders therefor bidding the lowest rate of interest: Provided, That said loan commissioners shall have the right to reject any and all bids: And provided further, That they may refuse to make any award unless sufficient security shall be furnished by the bidder or bidders for the compliance with the terms if their bids.

Marginal Notations: Issue and redemption, etc., of bonds. Advertisement of sale. Bids. Award to lowest bidder. Provisos. Rejection of bids. Security.

“Par. 2044. (Sec. 6.) When the sale of said bonds shall be awarded by the loan commissioners, they shall provide and procure the necessary bonds as in this act provided, and any expense incurred by them therefor, for the publication of said notices, costs of remitting funds for the payment of interest or money on said bonds, and all other necessary incidental expenses under the provisions of this act, shall be paid out of the general fund of said territory, upon the order of the territorial auditor, countersigned by the governor; and a sum of money sufficient to cover said costs and expenses is hereby appropriated out of said fund.

Marginal Notations: Loan commissioners to procure bids. Payment of expenses, etc. Appropriation.

“They shall, from time to time after signing said bonds, deliver them to the territorial treasurer, tak-

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ing his receipt therefor, and charge him therewith. The said treasurer shall give to the Territory of Arizona an additional official bond, with two or more sureties, in a sum equal to the amount of bonds delivered to him by the said loan commissioners, which bond shall be approved by the governor and deposited and filed with the secretary of the territory and recorded by him in a book to be kept for that purpose. And the said treasurer shall stand charged upon his official bond for the faithful performance of the duties required of him under this act.

Marginal Notation: Delivery of bonds. Additional bond of treasurer.

“Par. 2045. (Sec. 7.) The territorial treasurer shall sell said bonds for cash, or exchange them for any of the indebtedness for the redemption of which they were so issued, but in no case shall said bonds be sold or exchanged for less than their face or par value and the accrued interest at the time of disposal, nor must any indebtedness be redeemed at more than its face value and any interest that may be due thereon.

Marginal Notations: Sale or exchange of bonds. Limitations.

“That said treasurer shall endorse by writing or stamping in ink on the face of the paper evidencing the indebtedness received by him in exchange for said bonds, the time when and the amount for which exchanged.

Marginal Notation: Indorsement by treasurer.

“Par. 2046. (Sec. 8.) Moneys received by said

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treasurer shall be applied by him to the redemption of the indebtedness for the redemption of which bonds were issued, and the treasurer shall give notice, as is provided by law in case of payment and redemption of territorial warrants, of his readiness to redeem such indebtedness, and thereafter interest on all such indebtedness due and outstanding shall cease.

Marginal Notations Application of moneys received.
Notice of redemption. Cessation of interest.

Before any such indebtedness shall be paid the territorial auditor shall indorse on each certificate the amount due thereon, and shall write across the face of each the date of its surrender and the name of the person surrendering, and shall keep proper record thereof.

Marginal Notation: Indorsement by auditor. Record.

“Par. 2047. (Sec. 9.) There shall be levied annually upon the taxable property in this territory, and in addition to the levy for other authorized taxes, a sufficient sum to pay the interest on all bonds issued and disposed of in pursuance of the provisions of this act, to be placed in the territorial treasury, in the fund to be known as the ‘Interest Fund’. And fifty years after such bonds shall have been issued such additional amount shall be levied annually as will pay ten per cent of the total amount issued until all bonds issued under the provisions of this act are paid and discharged. Nothing herein contained shall be construed to prevent the legislature of Ari-

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zona from creating a sinking fund during the life of said bonds for their redemption at maturity.

Marginal Notations: Annual interest tax levy. "Interest fund." Additional ten per cent tax levy. Discharge of bonds. Sinking fund.

"The territorial board of equalization, or, on their failure, the territorial auditor, shall determine the rate of tax to be levied in the different counties in the territory to carry out the provisions of this act, and shall certify the same to the 'board of supervisors' in each county and to the municipal or school authorities; and the said board of supervisors, or authorities are hereby directed and required to enter such rate on their assessment rolls in the same manner and with the same effect as is provided by law in relation to other territorial, county, municipal and school taxes. Every tax levied under the provisions of authority of this act is hereby made a lien against the property assessed, which lien shall attach on the first Monday in March in each year, and shall not be satisfied or removed until such tax has been paid.

Marginal Notations: Determination of taxable rate. Certification and entry of taxable rate on assessment rolls. Tax becomes a lien on property.

"All moneys derived from taxes authorized by provisions of this act shall be paid into the territorial treasury, and shall be applied:

Marginal Notations: Tax moneys to go into treasury.

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“First. To the payment of the interest on the bonds issued hereunder.

Marginal Notation: Application of payments.

“Second. To the payment of the principal of such bonds: Provided, That all moneys remaining in the interest fund after the payment of the interest and all moneys remaining in the ‘redemption fund’ after all said bonds shall have been paid and discharged, shall be transferred by the territorial treasurer to the territorial ‘general fund.’

Marginal Notation: Proviso. Transfer of remaining moneys to “general fund.”

“Par. 2048. (Sec. 10.) Whenever, after the expiration of the fifty years from the date of issuance of any bonds under this act, there remains after the payment of the interest, as provided in the preceding section, a surplus of ten thousand dollars or more, it shall be the duty of the territorial treasurer to advertise, as in the manner of advertising by the loan commissioners for bids, for sale of bonds, which advertisement shall state the amount of money in the said redemption fund, and the number of bonds, numbering them in the order of their issuance, commencing at the lowest number then outstanding, which such fund is set apart to pay and discharge; and if such bonds so numbered in such advertisements shall not be presented for payment and cancellation at the expiration of such publication, then such fund shall remain in the treasury to discharge such bonds whenever presented, but they shall draw no interest after the ex-

piration of such publication. Before any such bonds shall be paid they shall be presented to the territorial auditor, who shall indorse on each bond the amount due thereon, and shall write across the face of each bond the date of its surrender and the name of the person surrendering. The territorial auditor shall keep a record of all bonds issued and disposed of by the territorial treasurer, showing their number, rate of interest, date, and amount of sale, when, where, and to whom payable, and if exchanged, for what, and when presented for the redemption, the date, amount due thereon, and person surrendering.

Marginal Notations: Redemption surplusage. Treasurer to advertise for presentation of certain bonds for payment, etc. Cessation of interest after publication. Indorsement by auditor before payment. Auditor's bond record.

“The boards of supervisors of the counties, the municipal and school authorities, are hereby authorized and directed to report to the loan commissioners of the territory their bonded and outstanding indebtedness, and said loan commissioners may, on written demand, require an official report from the board of supervisors of counties, the municipal or school authorities, of their bonded and outstanding indebtedness, and said loan commissioners shall provide for the redeeming or refunding of the county, municipal, and school district indebtedness, upon the official demand of said authorities, in the same manner as other territorial indebtedness, and they shall issue bonds for any indebtedness now allowed, or that may be hereafter allowed by law, to said county, municipality, or

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school district, upon official demand by said authorities; the county, municipality, or school district to pay into the territorial treasury, in addition to all other taxes authorized by law, such amounts as may be directed by the territorial board of equalization, or on their failure by the territorial auditor to be levied for the payment of the principal of the bonds issued in redemption, refunding, or other bonds issued to such county, municipality, or school district when the same shall become due, and, in addition, a rate of interest paid by the territory on such bonds.

Marginal Notations: County, municipal, and school district indebtedness. Report to loan commissioners. Redemption or refunding of same, on demand, into territorial bonds. Additional principal and interest bond-tax levies.

“Par. 2049. (Sec. 11.) When the treasurer pays or redeems any indebtedness he shall indorse, by writing or stamping in ink, on the face of the paper evidencing such indebtedness so paid or redeemed, the words ‘redeemed and cancelled’ with the date of cancellation. He shall keep a full and particular account and record of all his proceedings under the act and of the bonds redeemed and surrendered, and he shall transmit to the governor an abstract of all his proceedings under this act with his annual report, to be by the governor laid before the legislature at its meeting. All books and papers pertaining to the matter provided in this act shall at all times be open to the inspection of the party interested, or to the governor, or a committee of either branch of the legislature, or a joint committee of both.

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Marginal Notations: Cancellation upon payment of certificate, etc., by treasurer. Treasurer's bond record. Treasurer's annual report. Inspection of bond record, etc.

“Par. 2050. (Sec. 12.) It shall be the duty of the territorial treasurer to pay the interest on said bonds when the same falls due out of the said interest fund, if sufficient; and if said fund be not sufficient, then to pay the deficiency out of the general fund: Provided, That the territorial auditor shall first draw his warrant on the territorial treasurer, payable to the order of said treasurer, for the amount of such deficiency, out of the general fund.

Marginal Notations Payment of bond interest. Proviso. Deficiency.

“Par. 2051. (Sec. 13.) It shall be the duty of said loan commissioners to make a full report of all their proceedings had under the provisions of this act to the governor on or before the first day of January of each year, and said report shall be transmitted by the governor to the territorial legislative assembly.

Marginal Notations Loan commissioner's annual report.

“Par. 2052. (Sec. 14.) No bond issued under the provisions of this act shall be taxed within this territory.”

Marginal Notation: Exemption from taxation.

Sec. 15. That nothing in this act shall be construed to authorize any future increase of any indebtedness

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in excess of the limit prescribed by the "Harrison Act:" Provided, however, That the present existing and outstanding indebtedness, together with such warrants as may be issued for the necessary and current expenses of carrying on territorial, county, municipal, and school government for the year ending December thirty-first, eighteen hundred and ninety, may also be funded and bonds issued for the redemption thereof; and thereafter no warrants, certificates, or other evidences of indebtedness shall be allowed to issue or be legal where the same is in excess of the limit prescribed by the Harrison Act."

Marginal Notations: Maximum limit of indebtedness. Proviso. Exceptions. Limitation thereafter.

That all acts or parts of acts in conflict with this act are hereby repealed.

Marginal Notation: Repeal.

Exhibit H

(Chap. 200, 53d Cong. 2d Sess., August 3, 1894.)
BE IT ENACTED, etc., That an act entitled "An act approving, with amendments, the funding act of Arizona," approved June twenty-fifth, eighteen hundred and ninety, and paragraph twenty hundred and fifty-two (section fifteen) of said act, be, and the same is hereby, amended by adding thereto as follows:

"PROVIDED further, however, That the present outstanding warrants, certificates, and other evidences of indebtedness issued subsequent to December thirty first, eighteen hundred and ninety, for the nec-

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essary and current expenses of carrying on the territorial government only, together with such warrants as may be issued for such purpose for the years ending December thirty-first, eighteen hundre and ninety-four, and December thirty-first, eighteen hundred and ninety-five, may also be funded and bonds issued for the redemption thereof; and thereafter no warrants, certificates or other evidences of indebtedness shall be allowed to issue or be legal where the same is in excess of the limit prescribed by the 'Harrison Act'."

Marginal Notation: Funding of debts for necessary expenses.

Sec. 2. That all acts or parts of acts in conflict with this act are hereby repealed.

Marginal Notation: Limitation.

Exhibit I

"An act amending and extending the provisions of an act of congress entitled 'An act approving with amendments the funding act of Arizona,' approved June twenty-fifth, eighteen hundred and ninety, and the act amendatory thereof and supplementary thereto, approved August third, eighteen hundred and ninety-four.

"Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that the provisions of the act of congress approved June twenty-fifth, eighteen hundred and ninety, and August third, eighteen hundred and ninety-four, authorizing the funding of certain

indebtedness of the territory of Arizona, are hereby amended and extended so as to authorize the funding of all outstanding obligations of said territory, and the counties, municipalities, and school districts thereof, as provided in the act of congress approved June twenty-fifth, eighteen hundred and ninety, until January first, eighteen hundred and ninety-seven, and all outstanding bonds, warrants, and other evidences of indebtedness of the territory of Arizona, and the counties, municipalities, and school districts thereof, heretofore authorized by legislative enactments of said territory bearing a higher rate of interest than is authorized by the aforesaid funding act approved June twenty-fifth, eighteen hundred and ninety, and which said bonds, warrants, and other evidences of indebtedness have been sold or exchanged in good faith in compliance with the terms of the act of the legislature by which they were authorized, shall be funded, with the interest thereon which has accrued and may accrue until funded into the lower interest bearing bonds as provided by this act.

“Sec. 2. That all bonds and other evidences of indebtedness heretofore funded by the loan commissioners of Arizona under the provisions of the act of congress approved June twenty-fifth, eighteen hundred and ninety, and the act amendatory thereof and supplemental thereto, approved August third, eighteen hundred and ninety-four, are hereby declared to be valid and legal for the purposes for which they were issued and funded; and all bonds and other evidences of indebtedness heretofore issued under the authority of the legislature of said territory, as hereinbefore authorized to be funded, are hereby confirmed, ap-

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proved, and validated, and may be funded as in this act provided until January first, eighteen hundred and ninety-seven: provided, that nothing in this act shall be so construed as to make the government of the United States liable or responsible for the payment of any of said bonds, warrants, or other evidences of indebtedness by this act approved, confirmed, and made valid, and authorized to be funded.

“Approved June 6th, 1896.” (29 Stat. 262.)

Exhibit J

CHAPTER 54. (House Bill No. 65)

AN ACT

Ratifying, Approving and Validating the Highway Construction and Improvement Bonds of Maricopa County, in the Sum of Four Million (\$4,000,000.00) Dollars, and the Sale Thereof, Which Bonds Were Authorized to be Issued and Sold by the Board of Supervisors of said County, at an Election by the Property Tax Payers of Said County Held May 17th, 1919, With an Emergency Clause.

WHEREAS, at an election by the property tax payers of Maricopa County, Arizona, held May 17th, 1919, under the provisions of an Act of the Legislature of Arizona entitled, “an Act providing for the creation of County Highway Commissions and prescribing the powers and duties of such commission,” approved March 8, 1917, and Acts amendatory thereof and supplemental thereto, the Board of Supervisors of said

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county were authorized and empowered to issue and sell the bonds of said county in the sum of Four Million (\$4,000,000.00) Dollars, for the purpose of providing funds for the construction and improvement of certain portions of the public highways of said county; and

WHEREAS, pursuant thereto, the Board of Supervisors of Maricopa County, Arizona, did on the 9th day of July, 1919, enter into a contract of sale of said bonds with the following named persons, partnerships and corporations, to-wit:

Bolger, Mosser & Willaman, by T. J. Grace, Agent,
Elston and Company, by B. K. Blanchet, Agent,
C. W. McNear and Company, by B. K. Blanchet,
Agent,

Whitaker and Company, by B. K. Blanchet, Agent,
Mississippi Valley Trust Company, by B. K. Blanchet, Agent,

Sidney Spitzer and Company, by B. K. Blanchet, Agent,

Stacy and Braun, by B. K. Blanchet, Agent,
Terry, Briggs and Company, by B. K. Blanchet, Agent,

Prudden and Company, by B. K. Blanchet, Agent,
A. T. Bell and Company, by B. K. Blanchet, Agent,
Bosworth, Chanute and Company, by B. K. Blanchet, Agent,

Graves, Blanchet and Thornburgh, by B. K.

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Blanchet, Agent, (hereinafter designated as Graves, Blanchet and Thornburgh and associates) by virtue of which contract, the said Board of Supervisors did thereafter deposit said bonds with the Central Trust Company of Chicago, Illinois, to be delivered by it to the said Graves, Blanchet and Thornburgh and associates, upon the payment thereof by them, according to the terms of said contract; and

WHEREAS, the said Graves, Blanchet and Thornburgh and associates have, under the terms of said contract, taken a proportionate part of said bonds and have paid therefor One Million (\$1,000,000.00) Dollars pursuant to the provisions of said contract of sale, which said sum of One Million (\$1,000,000.00) Dollars is now being expended by the Maricopa County Highway Commission in the construction of such public highways; and

WHEREAS, the validity of said bonds and the contract of sale thereof by the board of supervisors of Maricopa County, Arizona, has been and is now questioned and disputed by reason of certain alleged irregularities in the issuance and sale thereof as aforesaid, and litigation in respect thereto is now pending in the courts of the State of Illinois;

NOW, THEREFORE, BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ARIZONA:

Section 1. That the bonds of the County of Maricopa in the sum of Four Million (\$4,000,000.00) Dollars, authorized by the election by the property tax payers of said county held May 17th, 1919, for the

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purpose of providing funds for the construction and improvement of certain portions of the public highways of Maricopa County, and the contract for the sale of such bonds entered into by the Board of Supervisors of said Maricopa County with Graves, Blanchet and Thornburgh and associates on the 9th day of July, 1919, are hereby ratified, approved and declared valid.

Section 2. All acts and parts of acts in conflict with the provisions of this act, are hereby repealed.

Section 3. Whereas, it is necessary for the preservation of the public peace and safety, and to prevent a great financial loss to Maricopa County through delay in the construction and improvement of its public highways, an emergency is hereby declared to exist, and this act shall be in full force and effect from and after its passage and approval by the Governor, and this act is hereby exempted from the operation of the REFERENDUM PROVISIONS of the State Constitution.

Approved March 7th, 1921.

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EXHIBIT K.

Chapter 86.

(Senate Bill No. 160.)

AN ACT

Ratifying, Approving and Validating the Highway Construction and Improvement Bonds of Maricopa County, in the Sum of Four Million Five Hundred Thousand (\$4,500,000.00) Dollars, Authorized to be Issued and Sold by the Board of Supervisors of Said County at an Election by the Property Tax Payers of Said County Held December 31st, 1920.

WHEREAS, at an election by the property tax payers of Maricopa County, Arizona, held December 31st, 1920, the Board of Supervisors of said County were authorized and empowered to issue and sell the bonds of said county to the amount of Four Million Five Hundred Thousand (\$4,500,000.00) Dollars, for the purpose of providing funds for the construction and improvement of certain public highways of said county; and

WHEREAS, the right and power of the Board of Supervisors of said county to issue and sell bonds, and the validity of said bonds when so issued and sold by the Board of Supervisors of said county has been and is now questioned and disputed:

NOW, THEREFORE, BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ARIZONA:

Section 1. That the election by the property tax

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payers of Maricopa County, Arizona, held December 31st, 1920, by and through which the Board of Supervisors of Maricopa County were authorized and empowered to issue and sell the bonds of said county to the amount of Four Million Five Hundred Thousand (\$4,500,000.00) Dollars, for the purpose of providing funds for the construction and improvement of certain of the public highways of said county, was a valid election and conferred upon the Board of Supervisors of said county the power and authority to issue and sell said bonds, and that said bonds when issued and sold by said Board of Supervisors are hereby declared to be free from any defect or invalidity by reason of any act or omission of said Board of Supervisors, in calling and holding said election or preparatory thereto.

Approved March 14th, 1921.

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Exhibit L

Chapter 2 Title 52 Revised Statute of 1913 with title as shown by original act filed in office of Secretary of State of Arizona.

AN ACT

ENABLING COUNTIES, SCHOOL DISTRICTS, CITIES, TOWNS, AND OTHER MUNICIPAL CORPORATIONS TO BECOME INDEBTED IN AN AMOUNT EXCEEDING FOUR PER CENTUM OF THE TAXABLE PROPERTY THEREIN; TO PROVIDE FOR ELECTIONS THEREFOR; TO PERMIT COUNTIES, SCHOOL DISTRICTS, CITIES, TOWNS, AND OTHER MUNICIPAL CORPORATIONS TO ISSUE BONDS FOR SUCH INDEBTEDNESS, AND TO PROVIDE FORR THE MANNER OF THE EXPENDITURE OF THE PROCEEDS OF SUCH BONDS, THE PAYMENT OF INTEREST THEREON, AND THE REDEMPTION THEREOF; TO PROVIDE FOR THE CREATION OF INDEBTEDNESS BY INCORPORATED CITIES AND TOWNS FOR SUPPLYING WATER, ARTIFICIAL LIGHT, AND SEWERS WHEN THE WORKS FOR SUCH WATER, ARTIFICIAL LIGHT AND SEWERS WHICH ARE OR SHALL BE OWNED OR CONTROLLED BY THE MUNICIPALITY AND FOR THE REPEAL OF ALL ACTS OR PARTS OF ACTS IN CONFLICT HEREWITH.

Be It Enacted by the Legislature of the State of Arizona:

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Title 12

Bond Issue by Counties, Cities, Towns and School Districts for the Purpose of Making Public Improvements.

Sec. 1; Act 29, Page 61, Laws 1912.

Sec. 1. Whenever it is attempted to increase the aggregate amount of the indebtedness of any county, school district, city, town, or other municipal corporation, so as to exceed four per centum of the value of the taxable property in such county, school district, city, town, or other municipal corporation, such value of taxable property therein to be ascertained by the last assessment for state and county purposes previous to such proposed incurring of such indebtedness, such county, school district, city, town, or other municipal corporation may become indebted in an amount exceeding four per centum of the value of such taxable property in the manner and by compliance with the provision of this title.

Sec. 2 id.

Sec. 2. Any county, school district, city, town, or other municipal corporation, acting through its (166) board of supervisors, board of school trustees, city or town council, or the governing body of any other municipal corporation, may, of its own volition, and must upon petition signed by fifteen per centum of the property tax-payers, who shall in all other respects be qualified electors, in said county, school district, city, town, or other municipal corporation, order an election by the property tax-payers who in all other respects

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shall be qualified electors, in such county, school district, city, town, or other municipal corporation, for the purpose of determining whether such indebtedness shall be authorized; provided that the order for the election in any school district shall be made by the board of supervisors in the county where such election shall be held, either upon such petition, or upon request of the board of school trustees.

Sec. 3, id.

Sec. 3. At any election so held, if a majority of the property tax-payers, who must also, in all respects, be qualified electors, therein voting at said election, in such county, school district, city, town, or other municipal corporation, shall vote in favor of the creation of an indebtedness in an amount exceeding four per centum of the value of the taxable property in such county, school district, city, town, or other municipal corporation, such value to be ascertained as provided in the first section of this title, such county, school district, city, town, or other municipal corporation shall be permitted to become indebted in an amount exceeding four per centum of the value of taxable property therein; provided, that in incorporated cities and towns the value of taxable property herein mentioned shall be taken from the last assessment for city or, town purposes made previous to incurring such indebtedness; and, provided, further, that any incorporated city or town, with such assent, may be allowed to become indebted to a larger amount, but not exceeding fifteen per centum additional, for supplying such city or town with water, artificial light, or sewers, when the works for supplying such water, light,

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or sewers (167) are or shall be owned and controlled by the municipality.

Sec. 4, id.

Sec. 4. Whenever the board of supervisors, board of school trustees, city or town council, or the governing body of any other municipal corporation, shall order an election for the purpose herein provided, it shall be the duty of said board of supervisors, board of school trustees, city or town council, or the governing body of any other municipal corporation, to order such election to be held at the regular voting place, or places, within the limits of said county, school district, city, town, or other municipal corporation, wherein such indebtedness is attempted to be created, not less than thirty nor more than sixty days from the date of said order; provided, whenever an election shall be held for the purpose of creating an indebtedness by a county, or school district, such order shall be made by the board of supervisors of the county wherein such election shall be held.

The order thus made shall prescribe the object of such election, as prescribed in the eighth section of this title, and shall be held to be prima facie evidence that all of the provisions necessary to give it validity or qualify such board of supervisors, city or town council, or the governing body of any other municipal corporation, to make such order have been fully complied with.

Sec. 5, id.

Sec. 5. Said board of supervisors, city or town

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council, or the governing body of any other municipal corporation shall cause to be posted at least five copies of such order in public places within the county, school district, city, town, or other municipal corporation wherein such election is to be held, at least twelve days prior to the date of the election, and shall post a copy of said notice at each polling place within the county, school district, city, town, or other municipal corporation; provided, that in addition to the posting of such notice, publication of a copy thereof shall be made in some newspaper designated by said board of supervisors, mayor of said city or town, or the executive officer of any other municipal corporation, for at least thirty days prior to the date of such election. (168).

Such election shall be held in conformity with the provisions of the general election laws of the state and by the officers of election provided to be appointed by, and who shall qualify, under such laws; the return of said election in the case of a county, or school district, shall be made to the board of supervisors of the county wherein such election is held, and, in any other case, to the city or town council or other governing body of any other municipal corporation within twelve days from the date of such election; whereupon, the board of supervisors, city or town council, or the governing body of any other municipal corporation shall hold a special meeting on the first Monday succeeding said twelfth day for the purpose of canvassing the vote cast at said election; and they shall immediately thereafter by the certificate in the next section of this title, provided, declare the result of said election.

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Said certificate of the result of election, so made, shall be prima facie evidence of the complete performance of all of the conditions and requirements precedent to holding of such election.

Sec. 6, id.

Sec. 6. At any election so held, if a majority of the property tax-payers, who must also in all respects be qualified electors, therein voting at said election, in such county, school district, city, town, or other municipal corporation, shall vote in favor of the creation of an indebtedness in excess of four per centum of taxable property, the value of such taxable property to be ascertained as herein prescribed, it shall be the duty of the board of supervisors, city or town council, or the governing body of any other municipal corporation (at the time prescribed in section 5 hereof) to file and record in the office of the county recorder of such county wherein such election is held, a certificate showing the object of such election, the total number of votes cast in favor of the creation of such indebtedness and the total number of votes cast against the creation of such indebtedness; and such certificate shall contain a further statement that the creation of such indebtedness is ordered; and thereupon it shall immediately become the duty (169) of such board of supervisors, board of school trustees, city or town council, or the governing body of any other municipal corporation, to take such steps as are in this title required to carry out the object of such election.

Sec. 7, id.

Sec. 7. No political subdivision or municipal cor-

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poration other than the subdivision or municipal corporation wherein the election shall be held as above prescribed, for the creation of any indebtedness herein provided for, shall in any manner be responsible for, or charged with, the payment of any of the principal sum or interest thereon evidenced by such indebtedness.

Sec. 8, id.

Sec. 8. Whenever any county, school district, city, town, or other municipal corporation, shall desire under the provisions of this title to issue bonds or other evidences of indebtedness of said county, school district, city, town, or other municipal corporation, the board of supervisors, board of school trustees, city or town council, or the governing body of any other municipal corporation, may, with the assent of a majority of the property tax-payers, therein voting at said election, in such county, school district, city, town, or other municipal corporation, given in the manner herein provided, issue and sell bonds of said county, city, school district, town, or other municipal corporation, as herein provided, in the amount of indebtedness authorized at said election to be created; provided that in the call for said election hereinbefore in the second section of this title, required to be made, there shall be set forth the aggregate amount of said bonds, the term thereof, the rate of interest to be paid thereon, when such interest shall be paid, the date of maturity of said bonds or other evidences of indebtedness, and the purposes for which the money derived from the sale of such bonds or other evidences of indebtedness shall be expended.

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No bonds or other evidences of indebtedness authorized to be issued shall bear interest at a rate exceeding six per centum per annum.

Sec. 9, id.

Sec. 9. Whenever an issuance of bonds or other evidence of indebtedness shall have been authorized under the provisions of this title, it shall become the duty of the county board of supervisors in behalf of the county or board of school trustees, city or (170) town council or the governing body of any other municipal corporation issuing said bonds or other evidences of indebtedness, to cause said bonds to be prepared in the amount and of the denominations so authorized, which bonds, or other evidences of indebtedness shall bear the date of their issuance, shall be numbered consecutively from one upwards, and shall be signed and attested by the following persons, to-wit: when issued by the county, by the chairman and the clerk of the board of supervisors; when issued by a school district, by the chairman and clerk of the board of school trustees, countersigned by the chairman of the board of supervisors of the county wherein such school district is situated; when issued by a city or town, by the mayor and the city clerk of such city or town; and when issued by any other municipal corporation, by the executive officer and clerk of the governing body of such other municipal corporation, with the corporate seal of any such political sub-division or municipal corporation, if there be one, affixed thereto; and said bonds shall be payable at a date not to exceed forty years from the date of their issuance.

Sec. 10, id.

Sec. 10. Said bonds shall be payable to bearer, and

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coupons for the interest shall be attached to each of said bonds so that the same may be removed therefrom without mutilating the bonds, and each of said coupons shall bear a facsimile of the signature of the officers in the preceding section hereof mentioned as said signatures appear upon said bonds; provided that it shall not be necessary to impress upon any such coupon the seal hereinbefore mentioned.

Sec. 11, id.

Sec. 11. Before the sale of any of such bonds or other evidences of indebtedness, the board of supervisors, in behalf of the county or of the board of school trustees, or the city or town council, or the governing body of any other municipal corporation, as the case may be, shall at a regular meeting, or at a special meeting called for (171) that purpose, cause to be entered upon the record of said body an order directing the sale of said bonds or other evidence of indebtedness, and the date and hour of said sale, and shall cause a copy of said order to be published for at least four consecutive weeks before said sale in such daily or weekly newspaper or newspapers as may be designated by said body, together with a notice that sealed proposals will be received by them for the purchase of said bonds, or other evidences of indebtedness, on the date and hour named in said order.

Said governing body shall, at said time, and at a meeting to be held for such purpose, open all sealed proposals received by them, and shall award the purchase of said bonds to the highest and best responsible bidder; provided, that none of said bonds or other evi-

dences of indebtedness shall be sold for a less amount than par with accrued interest. All bids or proposals received for the purchase of said bonds, or other evidences of indebtedness, shall be accompanied by a certified check for a sum not less than five per cent of the total amount of such bid, and such governing body shall have the right to reject any and all bids, and all such certified checks accompanying bids which are not accepted, and which are rejected, shall be returned to the party tendering the same.

The certified check so deposited by the successful bidder shall be retained by said board of supervisors, or city or town council, and shall be forfeited in the event that such bidder shall not carry out the terms of the contract provided herein to be entered into; provided, however, that such forfeiture shall not be deemed or taken as stipulated or liquidated damages for a breach of contract and shall not prevent such board of supervisors, (172) or city or town council, from recovering damages under said contract.

Sec. 12, id.

Sec. 12. The amount of bonds sold, their numbers and dates shall be entered upon the record of the proceedings of the governing body of the county, school district, city, town, or other municipal corporation, disposing of the same.

Sec. 13, id.

Sec. 13. After said bonds or other evidences of indebtedness are issued, if such indebtedness is created by a county, or a school district situated therein, and

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until all of said bonds or other evidences of indebtedness of such county are redeemed, the board of supervisors of such county where such indebtedness is created under the provisions of this title, and the city or town council, or the governing body of any other municipal corporation, creating such indebtedness under the provisions of this title, if such bonds or other evidences of indebtedness are issued by such city or town, is authorized and it shall be its duty to levy and cause to be collected a tax in addition to the amount of taxes which now or may hereafter be authorized by law for state and county purposes, at the same time and in the same manner as other taxes are levied and collected by such county, city, or town upon all taxable property in such county, school district, or city, town or other municipal corporation, sufficient to pay the interest on all bonds issued when such interest shall become due, and said tax when collected shall constitute a fund for the payment of the interest on said bonds or other evidences of indebtedness and shall be called "Interest Fund."

Sec. 14, id.

Sec. 14. The board of supervisors of any county wherein any indebtedness shall be created under the provisions of this title, either by the county or by any school district situated therein, and the council of any incorporated city or town, shall also and in (173) addition to the taxes for state and county purposes, or the taxes for city and town purposes, as the case may be, and the tax hereinabove provided to be levied for the payment of interest on such bonds or other evidences of indebtedness, levy a tax for the purpose of redeeming said bonds or other evidences of indebt-

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edness when the same shall mature, as specified in the order and call for election hereinbefore in this title provided to be made, and all money derived from the levy of the tax in this section provided for, when collected, shall constitute a fund and shall be called the "Redemption Fund", and shall be used for the redemption of said bonds or other evidences of indebtedness according to the number of their issue. The tax in this section provided to be levied, shall be levied annually so as to provide a fund for the redemption of such bonds or other evidences of indebtedness when the same shall mature.

S. B. 86, 1st Leg., 3rd Sess., Sec. 1.

Whenever the owner of any coupon bond issued pursuant to the provisions of this title shall present such bond to the state auditor with the request for the conversion of such bond into a registered bond, the state auditor shall cut off and cancel the coupons of any such coupon bond so presented and shall stamp, print or write upon such bond so presented, either upon the back or the face thereon; as may be convenient, a statement to the effect that the said bond is registered in the name of the owner and that thereafter the interest and principal of said bond are payable to the registered owner. Thereafter and from time to time, any such bond may be transferred by such registered owner in person or by attorney duly authorized, on presentation of such bond to the auditor and the bond again registered as before, a similar statement being stamped, printed or (174) written thereon. Such statement stamped, printed or written up any such bond may be substantially in the following form:

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(Date, giving month, year and day.)

This bond is registered pursuant to the statutes in such case made and provided in the name of.....
....., and the interest and principal thereof are hereafter payable to such owner.

.....
State Auditor.

If any bond shall have been registered as aforesaid, the principal and interest of such bond shall be payable to the registered owner. The state auditor shall enter in the register of said bonds kept by him pursuant to the provisions of this title, or in a separate book, the fact of the registration of such bond and in whose name respectively, so that the said register or book shall at all times show what bonds are registered and the name of the registered owner thereof.

Sec. 15, Act 29, Page 61, Laws 1912.

Sec. 15. When any bonds or other evidences of indebtedness created under the provisions of this title shall mature, it shall be the duty of the county treasurer when such bonds shall have been issued by the county or any school district, and of the city and town treasurer, as the case may be, when any such bonds shall have been issued by any incorporated city or town, to give notice for four weeks in some newspaper published in the county in which such bonds or other evidences of indebtedness shall have been issued, of the intention of such county, school district, city, or town to redeem such bonds, stating the amount there-

of, and such redemption shall be made by the county, city, or town, as the case may be, and all said bonds or evidences shall cease to draw interest at the expiration of four weeks after the date of said notice, and if such bonds so noticed for redemption shall not be presented (175) for redemption within three months from the date of such notice, said county treasurer, or city or town treasurer, as the case may be, shall apply said money to the redemption of the bonds next in the order of the number of their issue.

When any interest shall be due upon any of said bonds or other evidences of indebtedness, under the provisions of this title, the coupons due and payable shall be delivered to the county, city, or town treasurer, as the case may be, who shall pay the same and write the word "Cancelled" across the face thereof, and said coupons so paid and cancelled shall be said treasurer's receipt for the payment of the same, and when any of said bonds or other evidences of indebtedness shall be paid and redeemed, said treasurer shall in like manner mark them "Cancelled" on the face thereof over his signature, and immediately deliver the same to the clerk of the said board of supervisors, or city or town council, as the case may be, taking his receipt therefor, and said clerk upon receipt of said cancelled bonds or other evidences of indebtedness shall file the same in his office and report the same to the board of supervisors, or city or town council, as the case may be.

The board of supervisors, city or town council, as the case may be, of any county, school district, city or town, issuing bonds or other evidences of indebtedness under the provisions of this title shall, by resolu-

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tion entered upon its minutes, prior to the offering for sale of said bonds or other evidences of indebtedness, and within a period of fifteen days from the canvassing of the vote of the election herein provided for, prepare a form of bond, which shall substantially conform to the description of said bonds mentioned in the order required by this title to be published and recorded.

Sec. 16, id.

Sec. 16. If any bonds or other evidences of indebtedness shall be issued and sold by any county, school district, city, town, or other municipal corporation, under the (176) provisions of this title, for the purpose of erecting and furnishing any public building within such county, school district, city, town, or other municipal corporation, the board of supervisors, in the event such public building shall be erected and furnished by the county or school district, and the city or town council in the event such public building is to be erected and furnished by a city, town, or other municipal corporation, shall, within the period which it is required under the provisions of the preceding section of this title, prepare and adopt a form of bond or other evidences of indebtedness, adopt plans and specifications for such building, and said board of supervisors, city or town council, as the case may be, shall, as soon as may be practicable after the adoption of such plans and specifications, advertise for bids for the erection and furnishing of said building.

The notice of advertisement for such bids shall set a day and hour, not less than forty days from the date of such notice, when said bids shall be received and

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opened, and said board of supervisors, city or town council, as the case may be, shall award the contract for the erection and furnishing, or the erection or furnishing of said building to the lowest and best responsible bidder, provided that any and all bids so submitted may be rejected. In the event any bid shall be accepted, said board of supervisors, city or town council, as the case may be, shall require the person or persons to whom such award or contract has been let, to enter into a written contract with said board of supervisors, city or town council, as the case may be, for the erection and completion of said building and the furnishing thereof, and shall require such person or persons entering into such contract to give bonds to said county, city or town, for the amount of the contract, (177) with two or more sufficient sureties, or give a surety company bond in a like manner, conditioned upon the faithful performance of the contract, such bond to be approved by the board of supervisors, city or town council, as the case may be.

Such board of supervisors, city or town council, as the case may be, may agree to pay and pay upon such contract as follows: Upon the completion of one-third of the work, one-fifth of the contract price; upon completion of two-thirds of the work, an amount sufficient with the prior payment to make one-half of the contract price; and the balance of the contract price shall be paid upon the completion and acceptance of the buildings and the furnishing thereof under said contract by said board of supervisors, city or town council.

In the event that it shall be deemed necessary in conjunction with the erection of the buildings herein

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mentioned to purchase a building site or sites, the call for the election shall state the proportion of the total amount of the fund to be derived from the issuance and sale of bonds or other evidences of indebtedness which shall be expended in the purchase of such building site or sites.

Sec. 17, *id.*

Sec. 17. Any incorporated city or town, with the assent of the qualified voters, as provided in the third section of this title, may be allowed to issue bonds or other evidences of indebtedness not exceeding fifteen per cent additional, for supplying such city or town with water, artificial lights, or sewers, when the works for supplying such water, artificial lights, or sewers, are or shall be owned or controlled by the municipality.

Sec. 18, *id.*

Sec. 18. The expenses of all proceedings had, (178) under this title, shall be borne by the county, school district, city, town, or other municipal corporation, instituting the proceedings necessary and required hereunder; provided, however, that in the event the bonds or other evidences of indebtedness herein authorized shall be sold, such expenses shall be deducted from the proceeds of the sale of such bonds or other evidences of indebtedness.

Sec. 1, S. B. 38, 1st Leg., 3rd Sess., 1913.

Sec. 19. Nothing in this title contained shall be construed to prevent any county, school district, city, town, or other municipal corporation from creating

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an indebtedness not exceeding four per centum of the value of the taxable property in such county, school district, city, town, or other municipal corporation; provided, that if such county, school district, city, town, or other municipal corporation shall desire to fund such indebtedness by the issuance of bonds, therefor, said bonds shall be issued in all respects in conformity with the provisions of this title; and, provided, further, that it will not be necessary to hold the election required to be held herein; provided, that bonds may be issued under the provisions of this title, for the construction and reconstruction of roads, bridges and highways; for the construction of public buildings, and for any other lawful or necessary purpose. The enumeration of the above mentioned purposes shall not be deemed as restrictive of the right to issue bonds for other purposes, but rather in furtherance thereof. In case any county in the State of Arizona shall have called or held an election for the issuance of bonds, as herein provided, prior to the becoming effective of the provisions of this section, said election shall be and is hereby deemed to have been called and held pursuant to the provisions of this title, and the bonds (179) that may be hereafter issued pursuant to such election, shall be in all respects as valid and legal as though the provisions of this section had been in force at the time of said election.

Sec. 20. All Acts and parts of Acts in conflict with the Act are hereby repealed.

Sec. 21. This Act shall take effect from and after the first day of October, 1913.

Apr 24 1913

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Read third time in full and passed by following vote:

28 ayes,—nays, 4 absent, 3 excused.

(signed) H. H. LINNEY
Speaker of the House

Passed the Senate April 17, 1913, by a vote of 17 ayes, 2 noes, — absent — excused.

(signed) M. G. CUNNIFF
President of the Senate

Approved April 29th, 1913:

(signed) GEO. W. P. HUNT
Governor of Arizona. (180)

United States
Circuit Court of Appeals
For the Ninth Circuit

E. J. JONES,

Appellant,

vs.

JIM BRUSH, State Treasurer of the State of Arizona; SIDNEY P. OSBORN, Governor of the State of Arizona; DAN E. GARVEY, Secretary of State of the State of Arizona; MARICOPA COUNTY; JOHN A. FOOTE, ED OGLESBY and PHIL ISLEY, constituting the Board of Supervisors of Maricopa County, Arizona,

Appellees.

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County and the Officials of
Maricopa County*

Upon Appeal from the District Court of the United
States for the District of Arizona



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No. 10560

**United States
Circuit Court of Appeals
For the Ninth Circuit**

E. J. JONES,

Appellant,

vs.

JIM BRUSH, State Treasurer of the State of Arizona; SIDNEY P. OSBORN, Governor of the State of Arizona; DAN E. GARVEY, Secretary of State of the State of Arizona; MARICOPA COUNTY; JOHN A. FOOTE, ED OGLESBY and PHIL ISLEY, constituting the Board of Supervisors of Maricopa County, Arizona,

Appellees.

BRIEF FOR APPELLEES

This proceeding is truly extraordinary. It is a companion suit to the case of State of Washington et al. v. Maricopa County et al., now pending in the United States Circuit Court of Appeals for the Ninth Circuit (No. 10493) and, so far as the Record is concerned, constitutes merely another attempt by counsel for appellant to retry in the Federal Courts the issues which heretofore have been heard and determined by the courts of the State of Arizona.

A. FEDERAL COURTS ARE WITHOUT JURISDICTION TO ENTERTAIN A SUIT BROUGHT AGAINST THE STATE BY A CITIZEN OF THE SAME STATE.

At the outset Appellant is met by the bar of the Eleventh Amendment to the Constitution of the United States.

This is a suit against the sovereign State of Arizona. That the State of Arizona was not joined as a titular defendant in the court below is immaterial as the question of whether the suit is in fact one against a sovereign state is to be determined by the essential nature and effect of the proceeding as the same appears from the entire Record.¹

We will point out that the complaint wholly fails to state a cause of action, but for purposes of discussion only it may be assumed that the complaint charges that the defendants who are officers of the State of Arizona are about to administer trust funds which have come into their custody pursuant to the Enabling Act of the States of New Mexico and Arizona (Act of June 20, 1910, 36 Stat. at L. 557).²

¹In the Matter of the State of New York, 256 U.S. 490, 65 L. ed. 1057, 1062, 41 S. Ct. 588:

“As to what is to be deemed a suit against a state, the early suggestion that the inhibition might be confined to those in which the state was a party to the record (*Osborn v. Bank of United States*, 9 Wheat. 738, 846, 850, 857, 6 L. ed. 204, 229, 231, 232) has long since been abandoned, and it is now established that the question is to be determined not by the mere names of the titular parties, but by the essential nature and effect of the proceeding, as it appears from the entire record.”

²Sections 1 to 18 of the Enabling Act refer to New Mexico. Sections 19 to 35 of the Enabling Act are reprinted in 1 Arizona Code Annotated 1939, pp. 37-51, and are reprinted in Exhibit B hereof, beginning at page v.

It is alleged that the public officers of the State of Arizona have violated the trust imposed upon them in that

“* * * it is the duty of said defendants, under the provisions of said Enabling Act, to resist the unlawful depletion of said trust funds by the above mentioned erroneous decisions of the Supreme Court of Arizona, by resorting to the Federal Courts to prevent the threatened unlawful call and redemption of said bonds, and the consequent depletion of the trust fund thereby; * * *” (R 36)

It seems obvious that if the complaint states a cause of action—which we deny—it is a cause of action against the sovereign State of Arizona which can act only by and through its duly authorized public officials.

(a) *The State of Arizona is the trustee of the proceeds of lands granted to the State by the Enabling Act.*

This conclusion necessarily follows from the simple fact that if any trust is created by the Enabling Act, it is the sovereign State of Arizona—and no public officer thereof—which is the trustee. The Enabling Act itself so provides.³ The Supreme Court of Arizona has so held,⁴ and this Court, upon review of the Enabling Act reached the same con-

³“§28. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to said territory, are hereby expressly transferred and confirmed to the said state, shall be *by the said state held in trust* * * * ” 36 Stat. at L. 557 (Emphasis is ours.) See Exhibit A, page i.

⁴*Campbell v. Caldwell*, 20 Ariz. 377, 181 Pac. 181, at p. 182:

“The Constitution, §1, art. 10, makes the state a trustee of the lands granted to it by the federal govern-

clusion⁵ It is the State of Arizona which is the owner of the lands granted by the United States under the Enabling Act and all of the proceeds thereof, and any judgment rendered in this proceeding against the state officers named as defendants would affect only funds held by the sovereign State of Arizona in trust and would not affect the action or proceeding of any individual officer. The State of Arizona therefore is the real party in interest and stands sued in this proceeding as though it were actually named a party. Under identical circumstances the Supreme Court of the United States in *Hagood v. Southern*, 117 U.S. 52, 29 L. ed. 805, 6 S. Ct. 608, has held that the suit in substance is one against the sovereign state. There the court had under consideration a suit to compel the officials of the State of South Carolina to provide for the levying of taxes under a statute repealed by the legislature in order to provide funds for the payment of revenue bond scrip issued in lieu of railroad bonds guaranteed by the State of South Carolina. The court said:

“* * * Though not nominally a party to the record, it is the real and only party in interest, the nominal defendants being the officers and agents of the State, having no personal interest

ment for the several purposes for which such lands are granted.”

Campbell v. Flying V. Cattle Co., 25 Ariz. 577, 220 Pac. 417, at p. 418:

“The lands owned or held in trust by the state were granted by the federal government under the provisions of the Enabling Act, and the state holds them the same as any other patentee.”

⁵*Kelly v. Allen* (C.C.A. 9th, Cir. 1931) 49 F. 2d 876, at p. 878:

“The state is not holding this land as an instrumentality of the United States, but in its own right, in trust, however, for the schools of the state * * *.”

in the subject matter of the suit, and defending only as representing the State.

* * * * *

“The State is not only the real party to the controversy, but the real party against which relief is sought by the suit; and the suit is, therefore, substantially within the prohibition of the Eleventh Amendment to the Constitution of the United States, which declares that ‘The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.’ ” (29 L. ed. at p. 810)

The situation here is not dissimilar to that which arose in *Louisiana v. Jumel*, 107 U.S. 711, 2 S. Ct. 128, 27 L. ed. 448, which was a suit against the Auditor and Treasurer of the State of Louisiana, and others, to recover upon coupons of bonds which had been invalidated by the adoption of a Constitution of Louisiana subsequent to the execution and delivery of the bonds.

Prior to the invalidation of the bonds, moneys had been collected and deposited in the treasury of the state to meet the payment of coupons and it was sought to require the public officers of Louisiana to apply these moneys to the payment of these coupons. The Supreme Court of the United States held that the action was one against Louisiana and could not be maintained, and in so holding (27 L. ed. 452) said:

“The Treasurer of State is the keeper of the Treasury, and in that way is the keeper of the money collected from this tax, just as he is the keeper of other public moneys. The taxes were collected by the tax collectors and paid over to the state Treasurer, that is to say, into the state

Treasury, just as other taxes were when collected. The Treasurer is no more a trustee of these moneys than he is of all other public moneys. He holds them, but only as the agent of the State. If there is any trust, the State is the trustee, and unless the State can be sued the trustee cannot be enjoined. The officers owe duty to the State alone, and have no contract relations with the bondholders. They can only act as the State directs them to act, and hold as the State allows them to hold. It was never agreed that their relations with the bondholders should be any other than as officers of the State, or that they should have any control over this fund except to keep it like other funds in the Treasury and pay it out according to law. They can be moved through the State, but not the State through them."

In *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 82 L. ed. 268, 58 S. Ct. 185, the Supreme Court said:

"* * * Since the proposed action is the performance of a duty imposed by the statute of the state upon state officials through whom alone the state can act, restraint of their action, which the bill of complaint prays, is restraint of state action, and the suit is in substance one against the state which the Eleventh Amendment forbids." (82 L. Ed. at p. 275)

(b) *The jurisdiction of the Federal Courts does not extend to a suit against a state by one of its own citizens even though the case arises under the Constitution and laws of the United States.*

Principality of Monaco v. State of Mississippi, 292 U.S. 313, 78 L. ed. 1282, 54 S. Ct. 745, seems determinative of the question. There the Supreme

Court of the United States reviewed *in extenso* the jurisdiction of federal courts generally to entertain a suit against a state, including a suit against a state by one of its citizens, and lays down this authentic doctrine:

“Similarly, neither the literal sweep of the words of Clause one of §2 of Article 3, nor the absence of restriction in the letter of the Eleventh Amendment, permits the conclusion that in all controversies of the sort described in Clause one, and omitted from the words of the Eleventh Amendment, a State may be sued without her consent. Thus Clause one specifically provides that the judicial Power shall extend ‘to *all* Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.’ But, *although a case may arise under the Constitution and laws of the United States*, the judicial power does not extend to it if the suit is sought to be prosecuted against a State, without her consent, *by one of her own citizens*, *Hans v. Louisiana*, 134 U.S. 1, 33 L. ed. 842, 10 S. Ct. 504; *Duhne v. New Jersey*, *supra* (251 U.S. p. 311), 64 L. ed. 280, 40 S. Ct. 154). The requirement of consent is necessarily implied. [78 L. ed. 1285]

* * * * *

“The question of that immunity, in the light of the provisions of Clause one of §2 of Article 3 of the Constitution, is thus presented in several distinct classes of cases, that is, in those brought against a State (a) by another State of the Union; (b) by the United States; (c) by the citizens of another State or by the citizens or subjects of a foreign State; (d) *by citizens of the same State* or by federal corporations; and (e) by foreign States. Each of these classes has its characteristic aspect, from the stand-

point of the effect, upon sovereign immunity from suits, which has been produced by the constitutional scheme. [78 L. ed. 1288-9]

* * * * *

“Protected by the same fundamental principle, the States, in the absence of consent, are *immune* from suits brought against them *by their own citizens* or by federal corporations, although such suits are not within the explicit prohibitions of the Eleventh Amendment. *Hans v. Louisiana*, 134 U.S. 1, 33 L. ed. 842, 10 S. Ct. 504, *supra*; *Smith v. Reeves*, 178 U.S. 436, 44 L. ed. 1140, 20 S. Ct. 919, *supra*; *Duhne v. New Jersey*, 251 U.S. 311, 64 L. ed. 280, 40 S. Ct. 154, *supra*; *Re New York*, 256 U.S. 490, 65 L. ed. 1057, 41 S. Ct. 588, *supra*.” [78 L. ed. 1289] (Emphasis ours.)

Duhne v. New Jersey, 251 U.S. 311, 64 L. ed. 280, 40 S. Ct. 154;

Smith v. Reeves, 178 U.S. 436, 44 L. ed. 1140, 20 S. Ct. 919;

Hans v. Louisiana, 134 U.S. 1, 33 L. ed. 842, 10 S. Ct. 504;

Re New York, 256 U.S. 490, 65 L. ed. 1057, 41 S. Ct. 588.

Hans v. Louisiana, *supra*, (the first case upon the question) was an action brought by a citizen of the State of Louisiana against that state in the federal court to recover upon coupons annexed to bonds issued by Louisiana, and subsequently invalidated by a provision of the Constitution of Louisiana. Hans asserted this provision was unconstitutional and void as contravening the contract clause of the Constitution of the United States. The Supreme Court of the United States affirmed the judgment of the lower federal court dismissing the action for

want of jurisdiction because the suit was one against the state by a citizen thereof.

Accordingly we submit that the judgment in this action against the officers of the State of Arizona would ultimately reach and affect the State of Arizona itself, even though it may not be named as a party defendant. If it were conceded that a depletion of the trust funds in the control of the State Treasurer by any act of the State Treasurer, the Governor and the Secretary of State, acting either as loan commissioners of the State of Arizona or as officers charged with the investment of the trust funds, it must necessarily affect property owned by the State of Arizona and not by any one sued as a defendant in the court below. What the public officials of the State of Arizona propose to do and of which the Appellant herein complains strikes at the State of Arizona and no one else. The State of Arizona is therefore the real party in interest and stands sued as though it were actually named as a party defendant. The members of the Board of Supervisors of Maricopa County are not proper or necessary parties. They have no authority whatever in connection with the administration of the trust funds, either under the provisions of the Enabling Act or under the provisions of the Constitution of Arizona accepting and consenting to these provisions of the Enabling Act.⁶

⁶Arizona Constitution, Article 10, §§1 and 2:

§1. [School lands held in trust.] All lands expressly transferred and confirmed to the state by the provisions of the Enabling Act approved June 20, 1910, including all lands granted to the state and all lands heretofore granted to the territory of Arizona, and all lands otherwise acquired by the state, shall be by the state accepted and held in trust to be disposed of in whole or in part, only in manner as in the said Enabling Act and in

The duty is imposed upon the State Treasurer to keep all funds invested in safe interest-bearing securities which shall be approved by the Governor and the Secretary of State.⁷

These same duties were imposed upon the same state officials by the Enabling Act, but neither the Constitution nor the Enabling Act confers any authority whatever upon boards of supervisors of the several counties of the State of Arizona with respect to the administration of these funds. Cer-

this constitution provided, and for the several objects specified in the respective granting and confirmatory provisions. The natural products and money proceeds of any of said land shall be subject to the same trusts as the lands producing the same. (See Exhibit A, page i.)

§2. [Lands to be used for objects designated.] Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than that for which such particular lands (or the lands from which such money or thing of value shall have been derived) were granted or confirmed, or in any manner contrary to the provisions of the said Enabling Act, shall be deemed a breach of trust." (See Exhibit A, page i.)

⁷Arizona Constitution, Article 10, §7:

§7. [School funds.] A separate fund shall be established for each of the several objects for which the said grants are made and confirmed by the said Enabling Act to the state, and whenever any moneys shall be in any manner derived from any of said lands, the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such moneys was, by said Enabling Act, conveyed or confirmed. No moneys shall ever be taken from one fund for deposit in any other, or for any object other than that for which the land producing the same was granted or confirmed. The state treasurer shall keep all such moneys invested in safe, interest-bearing securities, which securities shall be approved by the governor and secretary of state, and shall at all times be under a good and sufficient bond or bonds conditioned for the faithful performance of his duties in regard thereto." (See Exhibit A, page iii.)

tainly neither one conferred authority upon the particular Board of Supervisors of Maricopa County. If by any stretch of the imagination the members of the Board of Supervisors of Maricopa County are either proper or necessary parties to this proceeding, it could be so only because they are ex-officio officers and agents of the State of Arizona, justifying its claimed immunity from suit.

B. THE ENABLING ACT OF ARIZONA DOES NOT AND CANNOT CONFER JURISDICTION UPON THE FEDERAL COURTS TO ENTERTAIN THIS ACTION.

Having seen that a citizen may not, without the consent of the state, sue the state of which he is a citizen, in a federal court sitting in that state, perforce the decisions of the Supreme Court of the United States beginning with *Hans v. Louisiana*, 134 U.S. 1, 10 Sup. Ct. 504, 33 L. Ed. 842, down to *Principality of Monaco v. State of Mississippi*, 292 U.S. 313, 54 S. Ct. 745, 78 L. ed. 1282, we next proceed to ascertain whether jurisdiction is conferred, or can be conferred, by the Enabling Act, as asserted by the Appellant in this action.

- (a) *No jurisdiction is conferred by the Enabling Act upon the federal courts to entertain suits against the state by its own citizens.*

Section 31 of the Enabling Act expressly confers jurisdiction upon the United States District Court for the District of Arizona similarly as that jurisdiction is conferred upon district courts sitting in the several states of the United States, by providing:

“The circuit and district courts for said district, and the judges thereof, respectively, shall possess the same powers and jurisdiction and

perform the same duties required to be performed by the other circuit and district courts and judges of the United States, and shall be governed by the same laws and regulations.”

Thus, the source of the jurisdiction of the United States District Court for the District of Arizona is no broader or less restricted than the jurisdiction of other district courts. The supreme authority, therefore, for testing the jurisdiction of the United States District Court for the District of Arizona is found in the Constitution of the United States as construed by the Supreme Court of the United States in the several authorities which we have heretofore cited.

Recalling, therefore, that the Supreme Court of the United States had decided that in no instance may a citizen sue his state in a federal court, the last paragraph of Section 28 of the Enabling Act cannot be construed, either by adoption of the state law or otherwise, as conferring jurisdiction on the federal courts to entertain this action. That paragraph provides:

“Nothing herein contained shall be taken as in limitation of the power of the state or of any citizen thereof to enforce the provisions of this act.” (Exhibit B, page xix.)

This provision of the Enabling Act does not *expressly* confer jurisdiction upon the federal court to entertain this action, and could not in view of the decisions of the Supreme Court of the United States to the contrary, so it must be assumed that Congress in enacting this provision was cognizant of the decisions of the Supreme Court of the United States prohibiting the exercise of such jurisdiction.

The last sentence of the next to the last paragraph of Section 28 of the Enabling Act provides:

“It shall be the duty of the attorney-general of the United States to prosecute, in the name of the United States and in its courts, such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.” (Exhibit B, page xix.)

This section does not attempt to confer jurisdiction upon the Federal Courts of a suit by the United States to enforce the provisions of Section 28 of the Enabling Act affecting the disposition of funds derived by the state from the grant of lands by the national government under the Enabling Act. This jurisdiction, as indicated by the Supreme Court of the United States in *Principality of Monaco v. Mississippi*, supra, exists independently of the consent of the state. It is there said at p. 1289 of 78 L. Ed.:

“Upon a similar basis rests the jurisdiction of this Court of a suit by the United States against a State, albeit without the consent of the latter. While that jurisdiction is not conferred by the Constitution in express words, it is inherent in the constitutional plan. *United States v. North Carolina*, 136 U.S. 211, 34 L. ed. 336, 10 S. Ct. 920; *United States v. Texas*, 143 U.S. 621, 644, 645, 36 L. ed. 285, 292, 293, 12 S. Ct. 488; 162 U.S. 1, 90, 40 L. ed. 867, 902, 16 S. Ct. 725; *United States v. Michigan*, 190 U.S. 379, 396, 47 L. ed. 1103, 1109, 25 S. Ct. 742; *Oklahoma v. Texas*, 258 U.S. 574, 581, 66 L. ed. 771, 774, 42 S. Ct. 406; *United States v. Minnesota*, 270 U.S. 181, 195, 70 L. ed. 539, 544, 46 S. Ct. 298. Without such a provision, as this Court said in *United States v. Texas*, 143 U.S. 621, 36 L. ed.

285, 12 S. Ct. 488, *supra*, 'the permanence of the Union might be endangered.' "

So, we must construe the last paragraph of Section 28 of the Enabling Act in the light of its permissible application, and, when so construed, it can only mean that a *citizen* of the State of Arizona may enforce the provisions of that act, if at all, in the courts of the State of Arizona.

The Supreme Court of Arizona in *Boyce v. County of Pima, et al.*, 24 Ariz. 259, 208 Pac. 419, construed Section 25 of the Enabling Act with respect to the duties of the State Auditor and the State Treasurer to apply the proceeds realized by the State of Arizona from that section of the Enabling Act to the retirement of bonds issued by Maricopa, Pima, Coconino and Yavapai Counties. The state officials contended that the authority to enforce that section of the Enabling Act devolved upon the Attorney General of the United States, in the United States Court, and that no action could be maintained in the courts of the State of Arizona to compel the state officials to comply with that section of the Enabling Act. The Legislature had enacted a Land Code comprehensively treating with lands acquired by the state under the Enabling Act (Chap. 5, Laws of Arizona, 2nd Spec. Sess., 1915) which the Supreme Court construed as authorizing the counties affected to maintain the suit against the State Auditor and State Treasurer to require them to apply the funds in question to the retirement of the bonds issued by them. Upon this question the Supreme Court of Arizona (208 Pac. 421) said:

"This suggests some of the contentions of the appellants. The proposition is advanced that because the Congress, in the act granting certain

institutional lands to the state, reserved the right to institute suits, through the Attorney General of the United States, in the United States courts, to enforce the provisions of the trust, no action or proceeding can be maintained in the state courts to compel the state's agents to do and perform the things the state Legislature has provided they shall do in the execution of said trust. The mere statement of the contention condemns it. The duty sought to be enforced against the state treasurer and the state auditor is one imposed by a state law. Surely our courts have jurisdiction of questions concerning the duty and power of our state officers as conferred upon them by state legislation.

“Besides there is nothing in the language of the act of Congress (section 28, Enabling Act of June 20, 1910), conferring exclusive jurisdiction, to enforce the trust, or to prevent its breach, upon the United States courts, and, that being so, the *state courts have concurrent jurisdiction* of any actions or proceedings arising out of the administration of the trust. Indeed the very last sentence of section 28, *supra*, quite clearly conveys the idea that the federal courts shall not have exclusive jurisdiction of actions or proceedings to enforce the trust therein created. The state itself may bring such action, or any citizen may do so, *and have the question decided by the courts of the state.*” (Italics supplied)

Thus, the authority of the United States, and of the State of Arizona, and a citizen thereof, are correlative, with the limitation, however, that the authority of the United States is exercised in the United States Court having jurisdiction of the action, and that of the State of Arizona, and citizens thereof, in the courts of the State of Arizona when authorized by law. No other conclusion is deducible,

since as is respectfully submitted, the Federal Court is without jurisdiction to entertain this action against the State of Arizona without its consent by this appellant who is a citizen of the State of Arizona. The jurisdictional failure in the United States District Court is sufficient to dispose of the case in this Circuit Court of Appeals.

(b) *The Enabling Act cannot be construed to confer jurisdiction in a suit brought by a citizen who has no greater interest in the trust fund than any other member of the general public.*

The policy of Congress, as disclosed in the Enabling Act, was to vest in the Attorney General of the United States the power and duty to enforce the trusts created by the Enabling Act.

Ervien, Commissioner of Public Lands of the State of New Mexico v. United States, 251 U.S. 41, 64 L. ed. 128, 40 S. Ct. 75.

The reservation of the rights of citizens of the state to enforce the provisions of the Enabling Act falls far short of the adoption of any state law by Congress for the purpose of vesting jurisdiction in the Federal Courts to entertain a suit by anyone willy-nilly to enforce the terms of the trust. On the contrary, general principles of law would preclude this suit in the Federal Court as a mere citizen—suing as a member of the general community—has no standing in any court of the United States to maintain the suit. This was the square holding of the Circuit Court of Appeals for the Eighth Circuit in *Downer v. Graham*, 21 F. 2d 732, wherein the court considered that portion of the Enabling Act applicable to New Mexico, which is identical with Section 28 of the Act applicable to the State of

Arizona. In that case suit was brought in the Federal District Court by a citizen of New Mexico to enjoin state officials from alleged violation of the conditions imposed upon the lands granted to New Mexico by the Enabling Act. The court stated:

“All the above propositions, we take it, are abundantly supported by authority controlling here and by the provisions of the act. Section 10 of the Enabling Act, among other things, provides as follows:

“‘It shall be the duty of the Attorney General of the United States to prosecute in the name of the United States and its courts such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.’

“In *Mills County v. Railroad Companies*, 107 U.S. 557, 2 S. Ct. 654, 27 L. Ed. 578, that great lawyer, Mr. Justice Bradley, in speaking of a grant of swamp and overflowed lands to the state of Iowa, under conditions similar to those held by the state of New Mexico in this case, said:

“‘Upon further consideration of the whole subject, we are convinced that the suggestion then made, that the application of the proceeds of these lands to the purposes of the grant rests upon the good faith of the state, and that the state may exercise its discretion as to the disposal of them, is the only correct view. It is a matter between two sovereign powers, and one which private parties cannot bring into discussion.’

“Again, Mr. Justice Field, in the California case of *Hagar v. Reclamation District No. 108*, 111 U.S. 701, 4 S. Ct. 663, 28 L. Ed. 569, said:

“ ‘The contention of counsel is that the state is bound to carry out this condition, and apply the proceeds to the reclamation, or provide for their application to that end, and that its legislation imposing an assessment upon other lands to raise the necessary funds for that purpose, is in violation of this contract, and therefore void. The answer to this position is twofold. In the first place, if a contract was created by the Arkansas act [9 Stat. 519], when the state accepted its benefits, it is for the United States to complain of the breach if there be any. The plaintiff is not a party to the contract, and is in no position to invoke its protection. But, in the second place, the appropriation of the proceeds rests solely in the good faith of the state. Its discretion in disposing of them is not controlled by that condition, as neither a contract nor a trust following the lands was thereby created. This was distinctly held after elaborate consideration in the recent case of *Mills County v. Railroad Companies*, 107 U.S. 557, 566 [2 S. Ct. 654, 27 L. Ed. 578].’

“From the above cases the conclusion is reached a private citizen cannot call in question the action of the state through its officials in dealing with the proceeds of property granted to the state by the general government under the grant in question; but, on the contrary the grant having been made by the general government in its sovereign capacity to the state, in the exercise of its sovereign capacity, the matter rests solely and alone in the good faith of the state, in so far as its citizens are concerned, and *therefore the complainant in the bill has no capacity as a private citizen or taxpayer of the state to bring or maintain this suit to control*

the action of the state officials in dealing with the fund in question.” [Emphasis ours.] (21 F. (2d) at pp. 732-733)

The same ruling was made, in effect, by the Supreme Court of New Mexico in *Asplund v. Hannett*, 31 N.M. 641, 249 Pac. 1074, 58 A.L.R. 573, wherein the Supreme Court of New Mexico denied the right of a citizen of the state to sue in the state courts. Referring to the provision of the Enabling Act applicable to the State of New Mexico, the court stated:

“* * * But in the same section it is provided that nothing therein shall be taken as a limitation of the power of the state, or of any citizen thereof, to enforce the provisions of the act. Some question is raised as to the meaning of these provisions, but we think it plain. *So far as it established any power, or imposed any duty to enforce the provisions of the act, such power and duty were conferred and imposed upon the Attorney General of the United States. Congress conferred no power, and imposed no duty upon the state or citizen.* It simply recognized and consented to the power of the state to control its agencies, and recognized and consented to whatever rights a citizen of the state might have in the premises, *under state laws.*”

* * * * *

“* * * Hence, neither in the Enabling Act nor in the Constitution do we locate the power of a citizen and taxpayer to sue for the enforcement of the trust provisions.” (249 Pac. at pp. 1075-1076). [Emphasis ours].

Appellant has recognized that the Enabling Act “did not grant to citizens of the state the right to enforce the restrictions upon the expenditure of state land grant funds.” (Brief of Appellant p. 5). In truth and in fact it is clear that the Enabling Act

never contemplated a suit in the Federal Courts by one whose interests were no greater than any other member of the general public. The settled rule in the Federal Courts is that an individual, as such, has no sufficient interest or standing to justify the exercise of federal jurisdiction.

Massachusetts v. Mellon (1922), 262 U.S. 447, 67 L. ed. 1078, 43 S. Ct. 597:

“* * * His interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation of any payment out of the funds so remote, fluctuating, and uncertain that no basis is afforded for an appeal to the preventive powers of a court of equity.

* * * * *

“* * * If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect to the statute here under review, but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained.” (67 L. ed. p. 1085).

(c) *No question of the construction of the Enabling Act is here involved.*

Appellant seeks to invoke the jurisdiction of this Court on the ground that this is a case arising under the Constitution and laws of the United States,—particularly under the provisions of the Act of Congress of June 20, 1910 (36 Stat. at L. 557) commonly

known as the Enabling Act of the States of New Mexico and Arizona.⁸

By virtue of the provisions of Sections 24 to 28 of that Act, certain lands were granted to the State of Arizona in trust, their proceeds to be used for certain specified purposes, educational and otherwise. The State is constituted trustee of this trust and under Section 28 of the Act the State Treasurer is required to invest the proceeds of the sale of lands in "safe, interest-bearing securities." It is also provided in the Enabling Act that separate funds are to be created for each of the objects specified therein and that no funds are to be used for other than the specified purpose. Where in the complaint in the court below is it alleged that the investment by the State of Arizona in Maricopa County Highway Bonds constitutes a breach of trust? In fact it appears by the complaint itself that the funds were invested in interest-bearing securities as required by Section 28 of the Enabling Act and the safety of these securities is not in question. Furthermore, it is nowhere alleged by the Appellant that any acts formerly done, or that are proposed to be done by the State of Arizona, including the redemption of the outstanding Maricopa County Highway Bonds, constitute a breach of the terms of the trust as set forth in the Enabling Act of Congress creating the trust. The alleged breach—and the only alleged breach of trust—is the asserted claim that:

⁸Paragraph III of the complaint recites (R 3-4):

"That jurisdiction of the United States District Court for the District of Arizona is invoked in this suit upon the ground that this is a case arising under the Constitution and laws of the United States and particularly under the Act of Congress approved June 20, 1910, commonly known as the Enabling Act of the States of New Mexico and Arizona."

“* * * it is the duty of said defendants, under the provisions of said Enabling Act, to resist the unlawful depletion of said trust funds by the above mentioned erroneous decisions of the Supreme Court of Arizona, by resorting to the Federal Courts to prevent the threatened unlawful call and redemption of said bonds, and the consequent depletion of the trust fund thereby; * * *” (R 36).

Upon this flimsy foundation, plaintiff in the court below and now as Appellant herein seeks to relitigate and retry two decisions of the highest court of the State of Arizona and a decision of the Superior Court of Maricopa County.⁹

Thus Appellant seeks in one breath to maintain the jurisdiction of the Federal Courts on the ground that the outcome of the controversy is dependent upon the construction of an Act of Congress and then merely alleges that under his construction of the Constitution and statutes of the State of Arizona (which is admittedly contrary to the conclusions of all of the courts of that State) bonds held by the State of Arizona under the trust set up by an Act of Congress are not callable prior to their maturity date and refundable by the issuance of

⁹*Maricopa County v. Osborn* (decided May 4, 1942; rehearing denied Sept. 16, 1942), 59 Ariz. 244, 125 P. 2d 703 (herein called the “First Maricopa Case”).

Maricopa County v. Osborn (decided April 12, 1943), ——— Ariz. ———, 136 P. 2d 270 (herein called the “Second Maricopa Case”).

J. L. Gust v. Boettcher and Company, et al.,—decision of the Superior Court of Maricopa County granting summary judgment on June 21, 1943, in favor of defendant (herein called the “Taxpayer’s Suit”). A transcript of the record of this suit is printed separately as Brief of Appellees Appendix No. 1, in *State of Washington, et al., vs. Maricopa County, et al.*, No. 10493, now pending in this court.

State of Arizona refunding bonds. In short, the whole argument of Appellant is directed to the question of the construction of laws of the State of Arizona and by Appellant's very argument, if the bonds of Maricopa County are subject to call and redemption under the laws of the State of Arizona, there can be no breach of the alleged trust. Such has been the uniform holding of the courts in Arizona. This in itself is sufficient to show that no question of the meaning of the Act of Congress is here involved. The very cases upon which Appellant relies to establish jurisdiction prove the contrary.

In *King County v. Seattle School District*, 263 U.S. 361, 68 L. ed. 339, 44 S. Ct. 127, there was directly involved the question whether an Act of Congress permitted money received by the county to be expended by the county commissioners as directed by the State Legislature, or required an equal distribution annually for the benefit of public schools and public roads of the county. The Act of Congress, as construed by the Supreme Court

“does not direct any division of the money between schools and roads.” (68 L. ed. p. 341).

The case is therefore of importance only for the one point which was decided.

“* * * No trust for the benefit of appellee is created by the grant. But, assuming the moneys paid over to the State are charged with a trust that there shall be expended annually one-half for schools and one-half for roads, the appellee has no right to enforce the trust. Congress alone can inquire into the manner of its execution by the State.” (68 L. ed. p. 341).

The true rule is expressed in *First National Bank of Canton v. Williams*, 252 U.S. 504, 64 L. ed. 690, 40

S. Ct. 372, wherein the court stated (40 S. Ct. at page 374):

“* * * If the plaintiff thus asserts a right which will be sustained by one construction of the law, or defeated by another, the case is one arising under that law.”

Similarly, as this Court stated in *Marshall v. Desert Properties Co.*, (9th C.C.A.) 103 F. 2d 551, the case does not arise under the Constitution and laws of the United States unless it involves a dispute as to the validity, construction or effect of such law.

See, also *Smith v. Kansas City*, 255 U.S. 180, 65 L. ed. 577, p. 585, 41 S. Ct. 243.

It is not sufficient that the Appellant claims that the trust fund created by an Act of Congress may suffer loss because the proceeds of a sale of the trust lands were invested in bonds now callable for redemption under the laws of the State of Arizona, but the suit in order to vest jurisdiction in the Federal Courts must really and substantially involve a dispute or controversy affecting the validity, construction or effect of the Enabling Act upon the determination of which the result of the suit will depend. The meaning or construction of the Act of Congress of June 20, 1910 establishing the trust is in no manner called into question. Neither its validity, construction nor effect is in anywise involved. It is only by virtue of the fact that the ultimate source of the funds from which the outstanding bonds of Maricopa County were purchased was property granted by the United States to the State of Arizona in trust that Appellant seeks to invoke the jurisdiction of this Court to ask it to grant a rehearing of the final decisions of the Supreme Court of Arizona and of

the Superior Court of Maricopa County in a matter which involves solely the construction of state law. It is clear that this controversy may be finally determined without reference to the meaning of any Act of Congress. Therefore no federal question is raised under the Enabling Act.

The allegation that a breach of trust created under the Enabling Act exists because the state officers failed to institute suit in the Federal Court is wholly without merit. [R. 35-36].

No provision of the Enabling Act requires these public officers to institute any suit in the Federal Court or vests jurisdiction in the Federal Court of any suit which might be instituted by them.

Conceding the rule that a trustee is obligated to protect his trust estate, it is obvious from the Record that the State Treasurer and the public officials of the State of Arizona were over-zealous in the defense of their position. The reported decisions show that the State Treasurer appeared in both the First Maricopa Case and the Second Maricopa Case by the Attorney General of the State of Arizona and contested the right of Maricopa County to accelerate the maturity of its outstanding bonds. Learned *amici curiae* added their support to the position taken by the State Treasurer (R. 91, R. 98-116). In addition Mr. J. L. Gust, attorney herein for Appellant, filed suit as a taxpayer in the Superior Court of Maricopa County wherein a judgment (which is now *res judicata*) was rendered against the contentions herein asserted.¹⁰

¹⁰*J. L. Gust v. Boettcher and Company, et al*, (herein called the "Taxpayer's Suit"). The complete record is set forth as Appendix No. 1 to the Brief for Appellees in *State of Washington, et al, v. Maricopa, et al* (C.C.A. 9th Cir. No. 10493).

We repeat that no provision of the Enabling Act requires the State Treasurer or any state officer to institute any suit in the Federal Court, and it is clearly the rule that a trustee cannot be held guilty of breach of trust upon the mere ground that after asserting his rights in the state courts unsuccessfully he fails to relitigate the same issues in the Federal Court. The state courts are equally competent to decide federal questions as well as those relating solely to local law.¹¹ Such was in fact the holding of the Supreme Court of Arizona in *Boyce v. Pima County*, 24 Ariz. 259, 208 Pac. 419, wherein the Arizona Court held:

“Besides there is nothing in the language of the Act of Congress (section 28, Enabling Act June 20, 1910), conferring exclusive jurisdiction, to enforce the trust, or to prevent its breach, upon the United States courts, and, that being so, the state courts have concurrent jurisdiction of any actions or proceedings arising out of the administration of the trust. Indeed the very last sentence of section 28, supra, quite clearly conveys the idea that the federal courts shall not have exclusive jurisdiction of actions or proceedings to enforce the trust therein created. The state itself may bring such action, or any citizen may do so, and have the question decided *by the courts of the state.*” [Emphasis ours]. (208 Pac. at p. 422).

Furthermore, as the only question here involved is a question of state law, and it appears on the Record that the Federal Court is wholly without jurisdiction, it seems obvious that the State Treasur-

¹¹*Blythe v. Hinckley*, 180 U.S. 333, 45 L. ed. 557, 21 S. Ct. 390, page 392;

Grubb v. Public Utilities Commissioner, 281 U.S. 470, 74 L. ed. 972, 50 S. Ct. 374.

er (even if considered a trustee) is no more obligated to institute frivolous and unsubstantial lawsuits than he is to interpose sham and frivolous defenses in any action brought against him.¹²

As we have pointed out, the only obligation imposed on the State of Arizona under the Enabling Act is that the proceeds of the sale of lands conveyed to the State of Arizona shall be invested in "safe, interest-bearing securities." Nothing in the Enabling Act limits or restricts the amount of the investment or the purchase price to be paid for the investment, or limits or restricts the right of the state officers to invest moneys in safe, interest-bearing securities which may be subject to call and redemption at the option of the issuer prior to their fixed maturity date. A bond subject to redemption prior to its fixed maturity date is nevertheless an interest-bearing security as the optional redemption feature affects only the "yield" or the effective return on the investment. No loss will result from the call and redemption of the bonds as it is necessary only that the purchase price paid for the bonds be amortized over their life.¹³ It is obvious that the rate of return on all investments now held in the fund created by the Enabling Act will be affected by market

¹²*Barnes v. Lyles*, 110 S. C. 465, 96 S. E. 723, page 724:

"* * * An attorney or trustee is under no duty to interpose an unmeritorious or frivolous defense for his clients or *cestui que trusts*."

¹³Municipal securities are sold and traded in on a "yield" basis. The net return on the purchase price paid to maturity, and not the mere coupon rate of the bonds, is the correct "yield." See *Montgomery, Financial Handbook*, pages 115 et seq. *Putnam, Mathematical Theory of Finance*, pages 55 et seq.

conditions existing at the time of re-investment of the moneys. Such re-investment will be required whenever bonds now held in the fund mature and are collected, leaving available cash for re-investment. What market conditions may exist and what rate of return may be invested upon funds held in the trust are questions which are subject to all of the contingencies of any invested funds, but so far as the safety factor is concerned, the very fact that these Maricopa County Highway Bonds have been or will be called for redemption is in and of itself sufficient proof that the safety of the investment has been held intact. They are in fact safe, interest-bearing securities irrespective of whether Maricopa County elects to call and redeem them in accordance with the laws of the State of Arizona prior to their fixed maturity dates. On the other hand, whether the Maricopa County Bonds are subject to call and redemption prior to their fixed maturity dates, is solely a question of state law, and neither the validity, construction or effect of the federal statute—the Enabling Act—is involved in this determination. It is clear that the Federal Court cannot look merely to the Enabling Act to determine whether the Maricopa County Bonds are subject to call and redemption and whether, therefore, a breach of trust will exist if the bonds are in fact held to be subject to call and redemption.

On elementary principles it is submitted that the complaint in the court below fails to set forth any facts upon which federal jurisdiction can be based. It has always been the rule that to present such a case, it must appear from the allegations in the complaint that the outcome of the controversy depends

upon the construction of such federal law and that the controversy over such construction must be substantial.

The rule is well stated in *Western Union Telegraph Co. v. Ann Arbor R. Co.* (1899), 178 U.S. 239, 20 S. Ct. 867, 44 L. Ed. 1052, where it is said (L. Ed. 1054):

“When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, *upon the determination of which the result depends, it is not a suit arising under the Constitution or laws.* And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States before jurisdiction can be maintained on this ground. * * *” (Italics supplied).

In *Spencer v. Duplan Silk Co.* (1903), 191 U.S. 526, 24 S. Ct. 174, 48 L. Ed. 287, it is said (L. Ed. 290):

“In the present case it is contended that the jurisdiction was not dependent entirely on the opposite parties to the suit being citizens of different states, because the suit arose under the laws of the United States, and that, therefore, jurisdiction rested also on that ground. But a suit does not so arise unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution, or validity or *construction* of the laws or treaties of the United States, upon the determina-

tion of which the result depends, and which appears in the record by plaintiff's pleading * * *." (Italics supplied).

Cuyahoga River Power Co. v. Northern Ohio T. and L. Co. (1919), 252 U.S. 388, 40 Sup. Ct. 404, 64 L. Ed. 626. In holding that no federal question was presented the Court said at p. 630:

"The court, therefore, was considerate of the elements of the case and of plaintiff's rights, both against defendants as rival companies or as landowners; and necessarily, as we have said, if either or both of them be regarded as involved in the case, its or their assertion cannot be made in a Federal Court unless there be involved a Federal question. *And a Federal question not in mere form, but in substance, and not in mere assertion, but in essence and effect* * * *." (Italics supplied).

(d) *Federal jurisdiction is not created by the mere reservation of right to sue.*

Assuming that the Act of Congress granted to citizens of a state the right to enforce the provisions of this trust, this itself is insufficient to create a federal question within the jurisdiction of the Federal courts.

In *Shoshone Mining Co. v. Rutter* (1899), 177 U.S. 505, 20 S. Ct. 726, 44 L. Ed. 864, in holding that no federal question was presented simply by virtue of the fact that the suit was authorized by a federal law, the Court said at page 868:

"So, we conclude, as we did in the prior case, that although these suits may sometimes so present questions arising under the Constitution or laws of the United States that the Federal courts will have jurisdiction, yet the mere fact that a suit is an adverse suit authorized by the

statutes of Congress is not in and of itself sufficient to vest jurisdiction in the Federal courts
* * * .”

But section 28 of the Enabling Act did not grant jurisdiction in this court to permit plaintiff to assert the claim here made.

That section provides in part:

“Nothing herein contained shall be taken as in limitation of the power of the state or of any citizen thereof to enforce the provisions of this act.”

This clause by its tenor appears to assume the power of a citizen of the state to enforce the trust so set up, and then declares that such power is not intended to be limited. However, the statute can rise no higher than its source. In other words, plaintiff may show by the terms of this provision that his power to enforce this trust is not limited by the Enabling Act. But to come before this Court to exercise such alleged power, he must show that it has been granted him.

No other portion of this Act of Congress purports to grant him that right or power. The clause referred to must have been intended to mean that whenever there is a bona fide controversy as to whether the trust terms have been violated, the meaning of those terms is necessarily called into question; and there is then, and *only then*, a case arising under the laws of the United States, with jurisdiction granted to the federal district court. If this is not the import of this clause, then its insertion into the Enabling Act was but an idle act on the part of Congress.

The meaning or construction of the Act of Congress of June 20, 1910, Chap. 310, setting up the trust is in no manner called into question. By virtue of the fact that the ultimate source of the funds with which these outstanding bonds were purchased was property granted by the United States Government to the State of Arizona in trust, plaintiff seeks to invoke the jurisdiction of this court to ask it to grant a rehearing of final decisions of the Supreme Court of Arizona in a matter involving solely the construction of state laws.

This controversy may be finally determined without reference to the meaning of any Act of Congress and therefore no federal question is raised.

(e) *There is a total failure of Federal jurisdiction.*

Having shown that this suit cannot be maintained in the Federal Courts because (i) it is a suit against the sovereign State of Arizona which may not be sued without its consent, and (ii) it does not involve the validity, construction or effect of a federal statute, viz., the Enabling Act, we now pass to the other contentions advanced on this appeal "by way of passing" (Brief of Appellant, pages 15, 29, 48) to the effect that the decisions of the Arizona courts have impaired the obligations of Appellant's contracts.

This contention is utterly devoid of merit. Appellant is suing in the capacity of a citizen, resident and taxpayer of the State of Arizona against the sovereign State of Arizona. He does not claim to be a bondholder and the contract which is referred to as being impaired is that contained in the bonds issued by Maricopa County and now held by the

State of Arizona. Appellant is not a party to the contract and he claims no injury by virtue of any subsequent law of the State of Arizona, but only because he does not agree with the decisions of the courts of that State. These contentions may be summarily disposed of.

First: The obligation of a contract, within the meaning of Section 10 of Article I of the Constitution of the United States is not impaired by the decision of a state court.

Tidal Oil Co. v. Flanagan, 263 U.S. 444, 68 L. ed. 382, 44 S. Ct. 197 (dispelling this "persistent error").

Second: Even if it were assumed that subsequent legislation existed in this case—which is not the fact¹⁴—it has long been the settled rule that the contracts of the state or its governmental agencies are not impaired as to such governments by any legislative action subsequent to the execution of a contract. The State is the keeper of its own contract rights and without injuring private rights under such contract, it may impair its own rights or the rights of a subordinate governmental agency whenever it sees fit.

Little River T. P. v. Board of Com'rs (1902), 65 Kan. 9, 68 Pac. 1105.

In this case bonds were issued by the petitioner township. After their subscription the state passed a statute making them redeemable at the pleasure of the township after 10 years. The defendant county as holder claims that such statute impairs the obli-

¹⁴See Brief for Appellees in *State of Washington v. Maricopa County*, C.C.A. 9th Cir., No. 10493, pp. 14-22.

gation of its contract, since at the time of issuance these bonds were not redeemable.

In holding no impairment resulted, it was said, to quote from the syllabus by the court:

“2. A public corporation can acquire no vested contract rights as to the time of maturity or payment of bonds held by it against another public corporation. Public debts are matters of public concern, and as between debtor and creditor, both being public corporations, the legislature may, by proper enactment, compel the creditor corporation to accept payment even before maturity of the obligation held by it. *Such acts do not, as between public corporations, impair the obligation of contracts.*” (Emphasis ours).

As a matter of fact the relationship between a state and its political subdivisions or its public officers or agencies is not strictly a matter of contract. Such relationships may at any time be altered at the will of the State.

In *City of New Orleans v. New Orleans Water Works Co.*, (1891), 142 U.S. 79, 12 S. Ct. 142, 35 L. ed. 943, the city had a franchise with the company under which it received water without charge. A state statute subsequently passed required it to pay for the water, and it claimed that this constituted an impairment of its contract. In denying that a federal question was raised, the court said (35 L. ed. p. 947):

“ * * * In this case the city has no more right to claim an immunity for its contract with the Water Works Company, *than it would have had if such contract had been made directly with the State.* The State having authorized such contract, might revoke or modify it at its pleasure.”

Third: Even if it were assumed that subsequent legislation was involved and would impair the contract obligation in so far as a subordinate agency of the state is concerned, the rule is nevertheless well settled that one not a party to the contract cannot raise the constitutional issue of impairment. Here Appellant is not even a bondholder. He is, and claims to be, only one member of the general public—a citizen, resident and taxpayer of the State of Arizona. [R. 2]

In *Williams v. Eggleston*, 170 U.S. 304, 42 L. ed. 1047, 18 S. Ct. 617, it is stated:

“The first contention of plaintiff in error is that the contract of November 13, 1894, made between the state board and the Berlin Iron Bridge Company, was a valid contract, and that the two acts of May 24, 1895, and June 28, 1895, together with the orders and proceedings of the board of commissioners thereunder, are in violation of the 10th section of article I of the Federal Constitution, because they impair the obligation of that contract. A sufficient answer to this contention is, that the contract, if valid—and upon that we express no opinion—was between the state of Connecticut and the Berlin Iron Bridge Company, and that they have fully settled all differences in respect thereto. The parties to a contract are the ones to complain of a breach, and if they are satisfied with the disposition which has been made of it and of all claims under it, a third party has no right to insist that it has been broken.” (42 L. ed. at page 1049).

(f) *No question of deprivation of property without due process of law is present.*

Equally without merit is the contention (R. 40) that the redemption of outstanding Maricopa County

Bonds will deprive "the trust fund" of property without due process of law.

The constitutional mandate reads as follows:

" * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to *any person* within its jurisdiction the equal protection of the laws." (Italics supplied). (Amend. XIV, Sec. 1, U.S. Const.).

We know of no case where it has been contended, much less held, that a trust fund or any fund of money is a "person" within the constitutional inhibition. Furthermore, Appellant's alleged right to enforce the trust gives him no right to assert that he will be deprived of a constitutional right, especially when no breach of the trust is set forth.

Appellant has set forth no *facts* which show that he is to be deprived of property, and the rule must apply that one cannot raise the constitutional issue without showing some injury to himself.

In *Tyler v. Judges of the Court of Registration* (1900), 179 U.S. 405, 21 S. Ct. 206, 45 L. Ed. 252, wherein plaintiff did not set forth facts showing an injury to himself, the court held that he had an insufficient interest to raise the issue of denial of due process of law, saying at page 254:

"In the assignment of error he complains only of the unconstitutionality of the statute, in that it deprives persons of property without due process of law * * *."

* * * * *

"* * * but to give him status in this court he is bound under his petition *to show, either that he has been, or is likely to be, deprived of his prop-*

erty without due process of law, in violation of the 14th Amendment; * * *." (Italics supplied).

Finally, it may be said that Appellant's reference to the cases of *Maricopa County v. Osborn* as "erroneous decisions" of the Supreme Court of Arizona is insufficient to raise a federal question. It is the universal rule that even though the decision of a state court may be erroneous, there is involved no denial of due process of law. (*Standard Oil Company v. Missouri*, 224 U.S. 270, 32 S. Ct. 406, 56 L. Ed. 760; *Patterson v. Colorado*, 205 U.S. 454, 27 S. Ct. 556, 51 L. Ed. 879).

In view of the foregoing and the fact that jurisdiction of this court is neither alleged nor shown on any other ground, it is respectfully submitted that no jurisdiction over this controversy exists in the Federal Court.

The obvious failure to establish federal jurisdiction bears out our contention that the sole purpose of this suit is to harrass and impede the officials of the sovereign State of Arizona in the performance of their public functions and the simulated charges herein made are sufficient to demonstrate the correctness of the Affirmative Fourth Defense stated in Appellees' Answer (R. 80).¹⁵

¹⁵See, as to vexatious litigation generally, *Stewart v. Butler*, 27 Misc. 708, 709; 59 N.Y.S. 573, 574; *Cunha v. Anglo California National Bank*, 34 C.A. 2d. 383, 93 P. 2d 572.

A R G U M E N T

I

THE FEDERAL COURTS ARE NOT PERMITTED TO EXERCISE THEIR INDEPENDENT JUDGMENT ON THE MERITS OF A CASE CONTRARY TO THE LAWS OF ARIZONA, AS DETERMINED BY THE JUDGMENTS OF THE COURTS OF THAT STATE WHICH ARE NOW RES JUDICATA AND PLEADED AS SUCH.

It is clear that what the Appellant is again attempting is to retry the decisions in the First and Second Maricopa Cases and in the Taxpayer's Suit. The answer to all of the contentions advanced by Appellant is clearly expressed in *Toole County Irrigation District v. Moody*, (C.C.A. 9, 1942), 125 F. 2d 498, cert. den. 316 U.S. 706, 62 S. Ct. 1281, 86 L. ed. 1762; rehearing den. 87 L. ed. 51, 63 S. Ct. 24. There the issue was whether under Montana statutes, bonds of an irrigation district were general obligations of the district or merely a charge on the land. The Montana Supreme Court, reversing a former decision, construed the statute to give the bonds the status of being merely a charge on the land. In reversing the District Court which declined to follow the State Supreme Court decision, the Circuit Court for the Ninth Circuit said:

“ * * * This was error; for, under the doctrine of *Erie Railroad Co. v. Tompkins*, 1938, 304 U.S. 64, 54 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487, the District Court was required—as we, too, are required—to follow *State ex rel. Malott v. Board of County Commissioners*, supra, and *Rosebud Land & Improvement Co. v. Carter-*

ville Irrigation District, *supra*, notwithstanding our decision in the Judith Basin case.”

* * * * *

“Appellees argue that to give effect to the Montana decisions would violate the Constitution by impairing the obligation of a contract, namely, the district’s obligation the existence of which is here in dispute. Appellees’ argument assumes the existence of the obligation and thus begs the question, the question being whether or not the obligation exists. Whether it exists or not must be determined by the law of Montana as declared by the highest court of that State; * * *.”

See, also:

Getz v. Town of Belleair (C.C.A. 5) 120F. 2d. 494.

It has always been the rule, even prior to the *Erie* case, that federal courts are bound to follow the decisions of the highest courts of the state upon questions relating to the construction of state statutes. In Vol. 25, C.J., pp. 832-833 (Sec. 171) this rule is stated as follows:

“The federal courts are bound to follow the decisions of the highest courts of the state upon questions relating to the construction of the state constitution and the validity thereunder of state statutes; and where a state statute has been construed by the highest judicial tribunal of a state, such construction is regarded as a part of the statute and is as binding upon the federal courts as the text of the statutes itself. * * * ”

The case of *Marine Nat. Exch. Bank v. Kalt-Zimmers Mfg. Co.* (1943), 239 U.S. 357, 79 L. Ed. 427, 55 Sup. Ct. 226, considered a petition in a bankruptcy proceeding pending in Wisconsin for per-

mission to sell bonds that were pledged with petitioners by the bankrupt. The right to sell depended upon petitioners being holders in good faith. The bonds were received with knowledge that the pledgor was trustee under a deed of trust securing them, although the bonds themselves, payable to bearer, did not disclose this fact.

A Wisconsin statute provided that actual knowledge or knowledge of such facts as would amount to a taking in bad faith was required to prevent one from being a holder in due course. Subsequent to the transaction the Wisconsin Supreme Court declared that under the statute, knowledge on the part of the taker that the pledgor was a trustee under them did not constitute constructive notice or raise a duty to inquire as to whether the pledgor's title was subject to a trust because of abuse of his trust relation.

It appeared that this was against the majority ruling. The Circuit Court of Appeals said at 70 Fed. (2d) 818:

“The federal courts are not bound by a decision of a state court in the interpretation or application of a provision of a uniform law contrary to the weight of authority as established by decisions of other states.”

The argument was that the decision should not be followed because it was subsequent to the transaction.

The Supreme Court said, p. 432 of L. Ed.:

“The Negotiable Instruments Law of Wisconsin was part of the law of that state when the bonds in controversy were pledged. This being so, the decision in *Pollard v. Tobin* sup-

plies the governing rule irrespective of the date when the decision was announced.”

See, also:

Peters v. Broward, 222 U.S. 483, 56 L. Ed. 278, 32 Sup. Ct. 122;

Elmwood Township v. Marcy, 92 U.S. 289, 23 L. Ed. 710;

South Ottawa v. Perkins, 94 U.S. 260, 24 L. Ed. 154.

Even prior to the Erie Railroad Case and notwithstanding the general rule that the principles of construction of contracts were a matter of “general laws” as to which the state court decisions were not binding on the federal courts, it was nevertheless held that where a state court had construed a state statute which entered into and became a part of the contract, the federal court was bound by the construction of the statutory language. This was particularly true of cases involving the standard form fire insurance policies which were statutory contracts and the construction of the policy therefore involved the construction of the state statutes. The general rule was that the state court’s construction of a statute which became a part of the policy was binding on the federal court and the policy was therefore to be determined as to its construction and effect by what the state court said the statute meant.

Mutual Life Insurance Co. v. Johnson, 293 U.S. 335, 79 L. ed. 398, 55 S. Ct. 154;

Kansas City Life Insurance Co. v. Adamson, 24 F. (2d) 712;

Ocean Accident & Guar. Corp. v. Torres, 91 F. (2d) 464 (cert. den. 302 U.S. 741, 82 L. ed. 573, 58 S. Ct. 143;

- Clay v. Aetna Life Insurance Co.*, 53 F. (2d) 689;
Trapp v. Metropolitan Ins. Co., 72 F. (2d) 374;
Federal Life Ins. Co. v. Zebec, 82 F. (2d) 961;
Niagara Fire Ins. Co. v. Raleigh Hardware Co., 62 F (2d) 705;
New York Life Ins. Co. v. Truesdale, 79 F. (2d) 481;
Heine v. New York Life Ins. Co., 50 F. (2d) 382 (387);
Cook v. Illinois Bankers' Life Assn., 46 F. (2d) 782;
Great Southern Life Ins. Co. v. Burwell, 12 F. (2d) 244 (cert. den. 271 U.S. 683, 70 L. ed. 1150, 46 S. Ct. 633).

Similarly, where the contract was based upon local statutes, as, for example, an attachment bond or a supersedeas bond made according to state law, the obligation and liability are matters of local law and state decisions must be followed.

- Fidelity & Dep. Co. v. L. Bucki & Son Lbr. Co.*, 189 U.S. 135, 47 L. ed. 744, 23 S. Ct. 582;
Pennsylvania v. Fidelity & Dep. Co., 180 Fed. 292;
Hartford Fire Ins. Co. v. Nance, 12 F. (2d) 575;
National Surety Co. v. Jean, 36 F. (2d) 468, 68 A.L.R 1326.

Finally, we submit that the authoritative decision of the Supreme Court of the United States in *Erie Railroad Co. v. Tompkins* (1938) 304 U.S. 64, 82

L. ed. 1188, 58 S. Ct. 817, is conclusive. In that case the court said:

“Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or ‘general’, be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. * * *.” (58 S. Ct. 822).

II

THE STATUTES OF ARIZONA IN EFFECT WHEN THE MARICOPA COUNTY BONDS WERE ISSUED SPECIFICALLY PROVIDED THAT THE BONDS WERE SUBJECT TO REDEMPTION WHENEVER BONDS ISSUED BY THE LOAN COMMISSIONERS COULD BE SOLD AT A LOWER INTEREST RATE AND THE PROCEEDS OF SALE APPLIED TO THE CALL AND REDEMPTION OF THE COUNTY BONDS.

What Appellant herein is attempting to do is simply to retry the decisions of the courts of Arizona. Admittedly the problem stated by Appellant is simply one of “What is the state law?” This problem has been conclusively answered by:

Maricopa County v. Osborn, 59 Ariz. 244,
125 P. 2d 703;

Maricopa County v. Osborn,Ariz....., 136
P. 2d 270;

J. L. Gust v. Boettcher and Company (the record of which is set forth as Appendix No. 1 to the Brief for Appellees in *State of Washington v. Maricopa County, U.S. Circuit Court of Appeals for the Ninth Circuit No. 10493*).

The argument advanced under paragraph II of the Brief for Appellant in this case is copied almost verbatim (even to the inclusion of the erroneous statement "plaintiff's bonds") from pages 97 to 116, inclusive, of the Brief for Appellants in *State of Washington v. Maricopa County (U.S. Circuit Court of Appeals, Ninth Circuit, No. 10493)* and accordingly for answer we refer to and incorporate herein by reference pages 42 to 68, inclusive, of Brief for Appellees filed in the same proceeding (No. 10493).

III

THE CALL AND REDEMPTION OF THE OUTSTANDING MARICOPA COUNTY HIGHWAY BONDS INVOLVES NO BREACH OF TRUST OF THE ENABLING ACT OF THE STATES OF NEW MEXICO AND ARIZONA.

We have pointed out, *supra*, (pages 2 to 35) that neither have the Federal Courts jurisdiction of this simulated cause of action, nor is there involved, in truth or in fact, any alleged breach of trust. The argument advanced by Appellant under this heading is based upon the theory that the State of Arizona by subsequent legislation is attempting to divert the proceeds of the lands donated by the Enabling Act to purposes other than authorized by the trust. We have shown that the contrary is the case. No subsequent statute of the State of Arizona is involved. The proceeds of the sale of lands donated to the State of

Arizona have been invested in strict accordance with the terms of the Enabling Act in "safe, interest-bearing securities." These securities are subject to call and redemption and will, upon the publication of notice of redemption, be paid in full. The argument that the State Treasurer of the State of Arizona has violated his trust by failing to institute action in the Federal Court is wholly without merit (*supra*, page 25). The argument that the Federal Court has authority to determine the propriety of the investment or reinvestment of moneys in the trust fund is utterly without merit.

Ervien v. United States, 251 U.S. 41, 64 L. ed. 128, 40 S. Ct. 75.

On the other hand, whether the State Treasurer of the State of Arizona is obligated to surrender bonds of Maricopa County held in the trust fund upon their call and redemption is a matter of state law, upon which the State Courts have already adjudicated the respective rights of the parties. We respectfully submit that neither in law nor in fact is there any foundation for the argument advanced by Appellant.

IV

ALL THE MATTERS AT ISSUE IN THIS CAUSE HAVE BEEN DECIDED BY THE SUPREME COURT OF ARIZONA IN THE FIRST AND SECOND MARICOPA CASES, AND BY THE SUPERIOR COURT OF MARICOPA COUNTY IN THE TAXPAYER'S SUIT, WHICH DECISIONS ARE RES JUDICATA, FINAL, BINDING AND CONCLUSIVE UPON THE RIGHTS OF APPELLANT AND ALL OTHERS.

It is sufficient under this heading to point out that Appellant sues as a citizen, resident and taxpayer of the State of Arizona (R 2-3). The identical suit was brought by his attorney, Mr. J. L. Gust, in the Taxpayer's Suit and every issue herein was conclusively adjudicated in the Taxpayer's Suit. Such is the rule in Arizona.

Luhrs v. City of Phoenix, 33 Ariz. 156, 262 Pac. 1002.

We refer to and incorporate herein by reference pages 69 to 89, both inclusive, of the Brief for Appellees filed in this Court in *State of Washington v. Maricopa County* (No. 10493). When the plea of res judicata is sustained, state court decisions are binding even though a federal question be claimed.

Stone v. Bank of Kentucky, 174 U.S. 408, 43 L. ed. 1187, 19 S. Ct. 881, affirming 88 Fed. 383.

CONCLUSION

We submit that the judgment of the court below should be affirmed.

Dated: Phoenix, Arizona,
December 1, 1943.

Respectfully submitted,

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EXHIBIT A

ARTICLE 10 OF THE CONSTITUTION OF
THE STATE OF ARIZONA

(Vol. 1, Arizona Code Annotated, 1939,
pps. 171 to 175, incl.)

§1. (*School lands held in trust.*)—All lands expressly transferred and confirmed to the state by the provisions of the Enabling Act approved June 20, 1910, including all lands granted to the state and all lands heretofore granted to the territory of Arizona, and all lands otherwise acquired by the state, shall be by the state accepted and held in trust to be disposed of in whole or in part, only in manner as in the said Enabling Act and in this constitution provided, and for the several objects specified in the respective granting and confirmatory provisions. The natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

§2. (*Lands to be used for objects designated.*)—Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than that for which such particular lands (or the lands from which such money or thing of value shall have been derived) were granted or confirmed, or in any manner contrary to the provisions of the said Enabling Act, shall be deemed a breach of trust.

§3. (*Disposition of lands.*)—No mortgage or other encumbrance of said lands, or any thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of the

transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of such lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place in the manner, and after the notice by publication thus provided for sales and leases of the lands themselves; Provided, that nothing herein contained shall prevent the leasing of said lands referred to in this article, for a term of five years or less, without said advertisement herein required.

§4. (*Appraisal of lands.*)—All lands, leaseholds, timber, and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor in any case less than the minimum price hereinafter fixed, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid.

§5. (*Minimum price for school lands.*)—No lands shall be sold for less than three dollars per acre, and no lands which are or shall be susceptible of irrigation under any projects now or hereafter completed or adopted by the United States under legislation for the reclamation of lands, or under any other project for the reclamation of lands, shall be sold at less than twenty-five dollars per acre; Provided, that the state, at the request of the secretary of the interior, shall from time to time relinquish such of its lands to the United States as at any time are needed for irrigation works in connection with any such government project, and other lands in lieu thereof shall be selected from lands of the character named and in

the manner prescribed in section twenty-four of the said Enabling Act.

§6. (*Hydroelectric sites.*)—No lands reserved and excepted of the lands granted to this state by the United States, actually or prospectively valuable for the development of water powers or power for hydroelectric use or transmission, which shall be ascertained and designated by the secretary of the interior within five years after the proclamation of the President declaring the admission of the state, shall be subject to any disposition whatsoever by the state or by any officer of the state, and any conveyance or transfer of such lands made within said five years shall be null and void.

§7. (*School funds.*)—A separate fund shall be established for each of the several objects for which the said grants are made and confirmed by the said Enabling Act to the state, and whenever any moneys shall be in any manner derived from any of said lands, the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such moneys was, by said Enabling Act, conveyed or confirmed. No moneys shall ever be taken from one fund for deposit in any other, or for any object other than that for which the land producing the same was granted or confirmed. The state treasurer shall keep all such moneys invested in safe, interest-bearing securities, which securities shall be approved by the governor and secretary of state, and shall at all times be under a good and sufficient bond or bonds conditioned for the faithful performance of his duties in regard thereto.

§8. (*Sales contrary to constitution.*)—Every sale, lease, conveyance, or contract of or concerning any of the lands granted or confirmed, or the use thereof or the natural products thereof made to this state by the said Enabling Act, not made in substantial conformity with the provisions thereof, shall be null and void.

§9. (*Lands held under prior lease.*)—All lands expressly transferred and confirmed to the state, by the provisions of the Enabling Act approved June 20, 1910, including all lands granted to the state, and all lands heretofore granted to the territory of Arizona, and all lands otherwise acquired by the state, may be sold or leased by the state in the manner, and on the conditions, and with the limitations, prescribed by the said Enabling Act and this constitution, and as may be further prescribed by law; Provided, that the legislature shall provide for the separate appraisement of the lands and of the improvements on school and university lands which have been held under lease prior to the adoption of this constitution, and for reimbursement to the actual bona fide residents or lessees of such land upon which such improvements are situated, as prescribed by title 65, Civil Code of Arizona, 1901, and in such cases only as permit reimbursements to lessees in said title 65.

§10. (*Protection of residents on state lands.*)—The legislature shall provide by proper laws for the sale of all state lands or the lease of such lands, and shall further provide by said laws for the protection of the actual bona fide residents and lessees of said lands, whereby such residents and lessees of said lands shall be protected in their rights to their improvements (including water rights) in such manner that in case of lease to other parties the former lessee shall be paid by the succeeding lessee the value of such improvements and rights and actual bona fide residents and lessees shall have preference to a renewal of their leases at a reassessed rental to be fixed as provided by law.

§11. (*Maximum amount of land purchases.*)—No individual, corporation or association shall be allowed to purchase more than one hundred sixty (160) acres of agricultural land or more than six hundred forty (640) acres of grazing land.

EXHIBIT B

ACT OF CONGRESS OF JUNE 20TH, 1910,
COMMONLY DESIGNATED AS THE "EN-
ABLING ACT" PROVIDING FOR THE AD-
MISSION OF THE TERRITORY OF ARI-
ZONA INTO THE UNION OF STATES.

(Vol. 1, Arizona Code Annotated, 1939,
pps. 37 to 51, incl.)

ENABLING ACT

(Sections 1 to 18 inclusive refer to New Mexico)

§19. That the qualified electors of the territory of Arizona are hereby authorized to vote for and choose delegates to form a constitutional convention for said territory for the purpose of framing a constitution for the proposed state of Arizona. Said convention shall consist of fifty-two delegates; and the governor, chief justice, and secretary of said territory shall apportion the delegates to be thus selected, as nearly as may be, equitably among the several counties thereof in accordance with the voting population as shown by the vote cast at the election for delegate in congress in said territory in nineteen hundred and eight.

A qualified elector within the meaning of this section shall be any male citizen of the United States of the age of twenty-one years who shall have resided in the territory at least twelve months next preceding the date fixed for the election of delegates to the constitutional convention, as herein provided for, and who shall possess in other respects the qualifications of an elector as provided by title twenty, Revised Statutes of Arizona, August second, nineteen hundred and one. Within ten days after the issuance of the governor's proclamation ordering the election of delegates to the constitutional convention, as herein provided, the board of supervisors of each county of the territory shall meet and authorize and require a reregistration of the qualified electors of said

county; provided, however, that there need not be re-registration of the qualified electors whose names appear on the great register of said county for the year nineteen hundred and eight, but all such names, together with such as may be registered under the provisions of this section, shall constitute the great register of said county and be used at each of the elections herein provided for; and so far as the same is consistent with the provisions of this act, such registration, as also the making up, printing, distribution, and use of such great register, shall in all respects conform to and be governed by the provisions of chapter three of said title twenty, Revised Statutes of Arizona, nineteen hundred and one. And the provisions of this section shall apply to all voters at all elections for the election of delegates to the constitutional convention and for the ratification of the constitution, for state officers, members of the state legislature, representatives in congress, and all other officers named in said constitution or in any manner herein provided for or mentioned.

The governor of said territory shall, within thirty days after the approval of this act, by proclamation, in which the aforesaid apportionment of delegates to the convention shall be fully specified and announced, order an election of the delegates aforesaid on a day, designated by him in said proclamation, not earlier than sixty nor later than ninety days after the approval of this act. Such election for delegates shall be held and conducted, the returns made, and the certificates of persons elected to such convention issued, as nearly as may be, in the same manner as is prescribed by the laws of said territory regulating elections therein of members of the legislature existing at the time of the last election of said members of the legislature; and the provisions of said laws in all respects, including the qualifications of electors and registration, are hereby made applicable to the election herein provided for; and said convention when so called to order and organized shall be the sole judge of the election and qualifications of its

own members. Qualifications to entitle persons to vote on the ratification or rejection of the constitution formed by said convention when said constitution shall be submitted to the people of said territory hereunder shall be the same as the qualifications to entitle persons to vote for delegates to said convention.

§20. That the delegates to the convention thus elected shall meet in the hall of the house of representatives in the capitol of the territory of Arizona at twelve o'clock noon on the fourth Monday after their election, and they shall receive compensation for the period they actually are in session, but not for more than sixty days in all; after organization they shall declare on behalf of the people of said proposed state that they adopt the Constitution of the United States, whereupon the said convention shall be, and is hereby, authorized to form a constitution and provide for a state government for said proposed state, all in the manner and under the conditions contained in this act. The constitution shall be republican in form and make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence.

And said convention shall provide, by an ordinance irrevocable without the consent of the United States and the people of said state—

First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of said state shall ever be molested in person or property on account of his or her mode of religious worship; and that polygamous or plural marriages, or polygamous cohabitation, and the sale, barter, or giving of intoxicating liquors to Indians, and the introduction of liquors into Indian country are forever prohibited.

Second. That the people inhabiting said proposed state do agree and declare that they forever

disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the congress of the United States; that the lands and other property belonging to citizens of the United States residing without the said state shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by the state upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein, or in the ordinance herein provided for, shall preclude the said state from taxing as other lands and other property are taxed any lands and other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any act of congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said state so long and to such extent as congress has prescribed or may hereafter prescribe.

Third. That the debts and liabilities of said territory of Arizona, and the debts of the counties thereof, which shall be valid and subsisting at the time of the passage of this act, shall be assumed and paid by said proposed state, and that said state shall, as to all such debts and liabilities, be subrogated to all the rights, including rights of indemnity and reimbursement, existing in favor of said territory or of any of the several counties thereof at the time of the passage of this act; provided, that nothing in this act shall be construed as

validating or in any manner legalizing any territorial, county, municipal, or other bonds, obligations, or evidences of indebtedness of said territory or the counties or municipalities thereof which now are or may be invalid or illegal at the time said proposed state is admitted, nor shall the legislature of said proposed state pass any law in any manner validating or legalizing the same.

Fourth. That provisions shall be made for the establishment and maintenance of a system of public schools which shall be open to all the children of said state and free from sectarian control; and that said schools shall always be conducted in English.

Fifth. That said state shall never enact any law restricting or abridging the right of suffrage on account of race, color, or previous condition of servitude, and that ability to read, write, speak, and understand the English language sufficiently well to conduct the duties of the office without the aid of an interpreter shall be a necessary qualification for all state officers and members of the state legislature.

Sixth. That the capital of said state shall, until changed by the electors voting at an election provided for by the legislature of said state for that purpose, be at the city of Phoenix, but no election shall be called or provided for prior to the thirty-first day of December, nineteen hundred and twenty-five.

Seventh. That there be and are reserved to the United States, with full acquiescence of the state, all rights and powers for the carrying out of the provisions by the United States of the act of congress entitled "An act appropriating the receipts from the sale and disposal of public lands in certain states and territories to the construction of irrigation works for the reclamation of arid lands," approved June seventeenth, nineteen hundred and two, and acts amendatory thereof or supplementary thereto, to the same extent as if said state had remained a territory.

Eighth. That whenever hereafter any of the lands contained within Indian reservations or allotments in said proposed state shall be allotted, sold, reserved, or otherwise disposed of, they shall be subject, for a period of twenty-five years after such allotment, sale, reservation, or other disposal, to all the laws of the United States prohibiting the introduction of liquor into the Indian country.

Ninth. That the state and its people consent to all and singular the provisions of this act concerning the lands hereby granted or confirmed to the state, the terms and conditions upon which said grants and confirmations are made, and the means and manner of enforcing such terms and conditions, all in every respect and particular as in this act provided.

All of which ordinance described in this section shall, by proper reference, be made a part of any constitution that shall be formed hereunder, in such terms as shall positively preclude the making of any future constitutional amendment of any change or abrogation of the said ordinance in whole or in part without the consent of congress.

§21. That when said constitution shall be formed, as aforesaid, the convention forming the same shall provide for the submission of said constitution to the people of Arizona for ratification at an election which shall be held on a day named by said convention not earlier than sixty nor later than ninety days after said convention adjourns, at which election the qualified voters of Arizona shall vote directly for or against said constitution and for or against any provisions thereof separately submitted. The returns of said election shall be made by the election officers direct to the secretary of the territory of Arizona at Phoenix, who, with the governor and chief justice of said territory, shall constitute a canvassing board, and they or any two of them, shall meet at said city of Phoenix on the third Monday after said election and shall canvass the same. If a

majority of the legal votes cast at said election shall reject the constitution, the said canvassing board shall forthwith certify said result to the governor of said territory together with the statement of votes cast upon the question of the ratification or rejection of said constitution and also a statement of the votes cast for or against such provisions thereof as were separately submitted to the voters at said election; whereupon the governor of said territory shall, by proclamation, order the constitutional convention to reassemble at a date not later than twenty days after the receipt by said governor of the documents showing the rejection of the constitution by the people, and thereafter a new constitution shall be framed and the same proceedings shall be taken in regard thereto in like manner as if said constitution were being originally prepared for submission and submitted to the people.

§22. That when said constitution and such provisions thereof as have been separately submitted shall have been duly ratified by the people of Arizona, as aforesaid, a certified copy of the same shall be submitted to the President of the United States and to congress for approval, together with the statement of the votes cast thereon and upon any provisions thereof which were separately submitted to and voted upon by the people. And if congress and the President approve said constitution and the said separate provisions thereof, if any, or if the President approves the same and congress fails to disapprove the same during the next regular session thereof, then and in that event the President shall certify said facts to the governor of Arizona, who shall, within thirty days after the receipt of said notification from the President of the United States, issue his proclamation for the election of the state and county officers, the members of the state legislature, and representative in congress, and all other officers provided for in said constitution, all as hereinafter provided; said election to take place not earlier than sixty days nor later than ninety days

after said proclamation by the governor of Arizona ordering the same.

§23. That said constitutional convention shall, by ordinance, provide that in case of the ratification of said constitution by the people, and in case the President of the United States and congress approve the same, or in case the President approve the same and congress fails to act in its next regular session, all as hereinbefore provided, an election shall be held at the time named in the proclamation of the governor of Arizona, provided for in the preceding section, at which election of officers for a full state government, including a governor, members of the legislature, one representative in congress, and such other officers as such constitutional convention shall prescribe, shall be chosen by the people. Such election shall be held, the returns thereof made, canvassed, and certified to by the secretary of the territory, in the same manner as in this act prescribed for the making of the returns, the canvassing and certification of the same of the election for the ratification or rejection of said constitution, as hereinbefore provided, and the qualifications of the voters at said election for all state officers, members of the legislature, county officers, and representative in congress, and other officers prescribed by said constitution shall be made the same as the qualifications of voters at the election for the ratification or rejection of said constitution, as hereinbefore provided. When said election of state and county officers, members of the legislature, and representative in congress, and other officers above provided for shall be held and the returns thereof made, canvassed, and certified, as hereinbefore provided, the governor of the territory of Arizona shall certify the result of said election as canvassed and certified, as herein provided to the President of the United States, who thereupon shall immediately issue his proclamation announcing the result of said election so ascertained, and upon the issuance of said proclamation by the President of the United States the proposed state of

Arizona shall be deemed admitted by congress into the Union by virtue of this act on an equal footing with other states. Until the issuance of said proclamation by the President of the United States, and until the said state is so admitted into the Union and said officers are elected and qualified under the provisions of the constitution, the county and territorial officers of said territory, including the delegate in congress thereof elected in the general election in nineteen hundred and eight, shall continue to discharge the duties of their respective offices in and for said territory; provided, that no session of the territorial legislative assembly shall be held in nineteen hundred and eleven.

§24. That in addition to sections sixteen and thirty-six heretofore reserved for the territory of Arizona, sections two and thirty-two in every township in said proposed state not otherwise appropriated at the date of the passage of this act are hereby granted to the said state for the support of common schools; and where sections two, sixteen, thirty-two, and thirty-six, or any part thereof, are mineral, or have been sold, reserved, or otherwise appropriated or reserved by or under the authority of any act of congress, or are wanting or fractional in quantity, or where settlement thereon with a view to preemption or homestead, or improvement thereof with a view to desert-land entry has been made heretofore or hereafter, and before the survey thereof in the field, the provisions of sections twenty-two hundred and seventy-five and twenty-two hundred and seventy-six of the Revised Statutes, and acts amendatory thereof or supplementary thereto, are hereby made applicable thereto and to the selection of lands in lieu thereof to the same extent as if sections two and thirty-two, as well as sections sixteen and thirty-six, were mentioned therein: Provided, however, that the area of such indemnity selections on account of any fractional township shall not in any event exceed an area which, when added to the area of the above-named sections returned by

the survey as in place, will equal four sections for fractional townships containing seventeen thousand and two hundred and eighty acres or more, three sections for such townships containing eleven thousand and five hundred and twenty acres or more, two sections for such townships containing five thousand seven hundred and sixty acres or more, nor one section for such townships containing six hundred and forty acres or more; and provided, further, that the grants of sections two, sixteen, thirty-two, and thirty-six to said state, within national forests now existing or proclaimed, shall not vest the title to said sections in said state until the part of said national forests embracing any of said sections is restored to the public domain; but said granted sections shall be administered as a part of said forests, and at the close of each fiscal year there shall be paid by the secretary of the treasury to the state, as income for its common school fund, such proportion of the gross proceeds of all the national forests within said state as the area of lands hereby granted to said state for school purposes which are situated within said forest reserves, whether surveyed or unsurveyed, and for which no indemnity has been selected, may bear to the total area of said sections when unsurveyed to be determined by the secretary of the interior, by protraction or otherwise, the amount necessary for such payments being appropriated and made available annually from any money in the treasury not otherwise appropriated.

§25. That in lieu of the grant of land for purposes of internal improvements made to new states by the eighth section of the Act of September fourth, eighteen hundred and forty-one, and in lieu of the swamp land grant made by the Act of September twenty-eight, eighteen hundred and fifty, and section twenty-four hundred and seventy-nine of the Revised Statutes, and in lieu of the grant of thirty thousand acres for each senator and representative in congress, made by the Act of July second, eighteen hundred and three, which grants are here-

by declared not to extend to the said state, the following grants are hereby made, to-wit:

For university purposes, two hundred thousand acres; for legislative, executive, and judicial public buildings heretofore erected in said territory or to be hereafter erected in the proposed state, and for the payment of the bonds heretofore or hereafter issued therefor, one hundred thousand acres; for penitentiaries, one hundred thousand acres; for insane asylums, one hundred thousand acres; for school and asylums for the deaf, dumb, and blind, one hundred thousand acres; for miners' hospitals for disabled miners, fifty thousand acres; for normal schools, two hundred thousand acres; for state charitable, penal, and reformatory institutions, one hundred thousand acres; for agricultural and mechanical colleges, one hundred and fifty thousand acres; and the national appropriation heretofore annually paid for the agricultural and mechanical college to said territory shall until further order of congress, continue to be paid to said state for the use of said institution; for school of mines, one hundred and fifty thousand acres; for military institutes, one hundred thousand acres; and for the payment of the bonds and accrued interest thereon issued by Maricopa, Pima, Yavapai, and Coconino Counties, Arizona, which said bonds were validated, approved, and confirmed by the act of congress of June sixth, eighteen hundred and ninety-six (twenty-ninth statutes, page two hundred and sixty-two) one million acres; provided, that if there shall remain any of the one million acres of land so granted, or of the proceeds of the sale or lease thereof, or rents, issues, or other profits therefrom, after the payment of said debts, such remainder of lands; and the proceeds of sales thereof shall be added to and become a part of the permanent school fund of said state, the income therefrom only to be used for the maintenance of the common schools of said state.

§26. That the schools, colleges, and universities provided for in this act shall forever remain under

the executive control of the said state, and no part of the proceeds arising from the sale or disposal of any lands granted herein for educational purposes shall be used for the support of any sectarian or denominational school, college, or university.

§27. That five per cent of the proceeds of sales of public lands lying within said state which shall be sold by the United States subsequent to the admission of said state into the Union, after deducting all the expenses incident to such sales, shall be paid to the said state, to be used as a permanent inviolable fund, the interest of which only shall be expended for the support of the common schools within said state.

§28. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to said territory, are hereby expressly transferred and confirmed to the said state, shall be by the said state held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than for such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

No mortgage or other encumbrance of the said lands, or any part thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be

affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of the transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in the newspaper of the circulation which shall then be regularly published nearest to the location of such lands so offered; nor shall any sale or contract for the sale of any timber or other natural products of such lands be made save at the place, in the manner, and after the notice by publication thus provided for sales and leases of the lands themselves; provided, that nothing herein contained shall prevent said proposed state from leasing any of said lands referred to in this section for a term of five years or less without said advertisement herein required.

All lands, leaseholds, timber and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor, in any case less than the minimum price hereinafter fixed, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid.

No lands shall be sold for less than three dollars per acre, and no lands which are or shall be susceptible of irrigation under any projects now or hereafter completed or adopted by the United States under legislation for the reclamation of lands, or under any other project for the reclamation of lands, shall be sold at less than twenty-five dollars per acre: Provided, that said state, at the request of the secretary of the interior, shall from time to time relinquish such of its lands to the United States as at any time are needed for irrigation works in connection with any such government project. And

other lands in lieu thereof are hereby granted to said state, to be selected from lands of the character named and in the manner prescribed in section twenty-four of this act.

There is hereby reserved to the United States and excepted from the operation of any and all grants made or confirmed by this act to said proposed state all land actually or prospectively valuable for the development of water power or power for hydro-electric use or transmission and which shall be ascertained and designated by the secretary of the interior within five years after the proclamation of the President declaring the admission of the state; and no land so reserved and excepted shall be subject to any disposition whatsoever of said state, and any conveyance or transfer of such land by said state or any officer thereof shall be absolutely null and void within the period above named; and in lieu of the land so reserved to the United States and excepted from the operation of any of said grants there be, and is hereby, granted to the proposed state an equal quantity of land to be selected from land of the character named and in the manner prescribed in section twenty-four of this act.

A separate fund shall be established for each of the several objects for which the said grants are hereby made or confirmed, and whenever any moneys shall be in any manner derived from any of said land the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such moneys was by this act conveyed or confirmed. No money shall ever be taken from one fund for deposit in any other, or for any object other than that for which the land producing the same was granted or confirmed. The state treasurer shall keep all such moneys invested in safe, interest-bearing securities, which securities shall be approved by the governor and secretary of state of said proposed state, and shall at all times be under a good and sufficient bond

or bonds conditioned for the faithful performance of his duties in regard thereto, as defined by this act and the laws of the state not in conflict herewith.

Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this act shall be null and void, any provisions of the constitution or laws of the said state to the contrary notwithstanding. It shall be the duty of the attorney-general of the United States to prosecute, in the name of the United States and in its courts, such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.

Nothing herein contained shall be taken as in limitation of the power of the state or of any citizen thereof to enforce the provisions of this act.

§29. That all lands granted in quantity, or as indemnity, by this act, shall be selected, under the direction and subject to the approval of the secretary of the interior, from the surveyed, unreserved, unappropriated, and nonmineral public lands of the United States within the limits of said state, by a commission composed of the governor, surveyor general or other officer exercising the functions of a surveyor-general, and the attorney-general of the said state, and after its admission into the Union said state may procure public lands of the United States within its boundaries to be surveyed with a view to satisfying any public land grants made to said state in the same manner prescribed for the procurement of such surveys by Washington, Idaho, and other states by the act of congress approved August eighteen, eighteen hundred and ninety-four (twenty-eight Statutes at Large, page three hundred and ninety-four) and the

provisions of said act, in so far as they relate to such surveys and the preference right of selection, are hereby extended to the said state of Arizona. The fees to be paid to the register and receiver for each final location or selection of one hundred and sixty acres made hereunder shall be one dollar.

§30. That all grants of lands heretofore made by any act of congress to said territory, except to the extent modified or repealed by this act, are hereby ratified and confirmed to said state, subject to the provisions of this act, provided, however, that nothing in this act contained shall, directly, or indirectly, affect any litigation now pending and to which the United States is a party, or any right or claim therein asserted.

§31. That the said state, when admitted as aforesaid, shall constitute one judicial district, and the circuit and district courts of said district shall be held at the capital of said state, and the said district shall, for judicial purposes, be attached to the ninth judicial circuit. There shall be appointed for said district one district judge, one United States attorney, one United States marshal. The judge of said district shall receive a yearly salary the same as other similar judges of the United States payable as provided by law, and shall reside in the district to which he is appointed. There shall be appointed clerks of said courts, who shall keep their offices at the capital of said state. The regular terms of said courts shall be held on the first Monday in April and the first Monday in October of each year. The circuit and district courts for said district, and the judges thereof, respectively, shall possess the same powers and jurisdiction and perform the same duties required to be performed by the other circuit and district courts and judges of the United States, and shall be governed by the same laws and regulations. The marshal, district attorney, and the clerks of the circuit and district courts of said district, and all other officers and persons performing duties

in the administration of justice therein, shall severally possess the powers and perform the duties lawfully possessed and required to be performed by similar officers in other districts of the United States, and shall, for the services they perform, receive the fees and compensation now allowed by law to officers performing similar services for the United States in the territory of Arizona.

§32. That all cases of appeal or writ of error and all other proceedings heretofore lawfully prosecuted and now pending in the Supreme Court of the United States or in the proper circuit court of appeals upon any record from the Supreme Court of said territory, and all cases of appeal or writ of error and all other proceedings heretofore lawfully prosecuted and now pending in the Supreme Court of the United States upon any record from a district court of said territory, or, in any matter of habeas corpus, upon any return or order of a district judge thereof, and all and singular the cases aforesaid which, hereafter shall be so lawfully prosecuted and remain pending in the Supreme Court of the United States or in the proper circuit court of appeals, may be heard and determined by the Supreme Court of the United States or the proper circuit court of appeals, as the case may be. And the mandate of execution or of further proceedings shall be directed by the Supreme Court of the United States or the circuit court of appeals to the circuit or district court hereby established within the said state, or to the Supreme Court of such state, as the nature of the case may require. And the circuit, district, and state courts herein named shall, respectively, be the successors of the Supreme Court and of the district courts of said territory as to all such cases arising within the limits embraced within the jurisdiction of said courts, respectively, with full power to proceed with the same and award mesne or final process therein; and that from all judgments and decrees or other determinations of any court of the said territory, in any case begun prior to admission, the parties to

such cause shall have the same right to prosecute appeals, writs of error, and petitions for review to the Supreme Court of the United States or to the circuit court of appeals as they would have had by law prior to the admission of said state into the Union.

§33. That the said circuit or the said district courts, as the case may be, shall have jurisdiction to hear and determine all trials, proceedings, and questions arising, or which may be raised, in any case or controversy pending in any of the courts other than the Supreme Court of the said territory at the date of its admission as a state, the case being such that, under the laws of the United States touching the jurisdiction of federal courts, it might properly have been begun in or (as a separate controversy or otherwise) removed to said circuit or said district court had they been established when the litigation of such case or controversy was commenced. Should such case or controversy be such that, if begun within a state, it would have fallen within the exclusive original cognizance of a circuit or district court of the United States sitting therein, it shall be transferred to the one or the other of said courts sitting within said state of Arizona, with due regard for the general provisions of law defining their respective jurisdictions; but should such case or controversy be by nature one of those which under such general jurisdictional provisions fall within the concurrent, but not the exclusive, jurisdiction of such courts, then such transfer may be had upon application of any party to such case or controversy, to be made as nearly as may be in the manner now provided for removal of cases from state to federal courts, and not later than sixty days after the lodgement of the record of such case or controversy in the proper court of the state as herein provided. All cases and controversies pending at the admission of the state, and not transferable to the said circuit or district court under the foregoing provisions, shall be heard and determined by the proper court of the state.

All files, records and proceedings relating to any such pending cases or controversies shall be transferred to such circuit, district and state courts, respectively, in such wise and so authenticated or proven as such courts shall respectively by rule direct, and upon transfer of any case or controversy as herein provided the same shall be proceeded with in due course of law; and no writ, action, indictment, information, cause or proceeding pending in any court of the said territory at the time of its admission as a state shall abate or be deemed ineffective by reason of such admission, but the same shall be transferred and proceeded with in the proper circuit or district court of the United States or state court, as the case may be, provided, however, that all cases pending and undisposed of in the Supreme Court of the said territory at the time of the admission thereof as a state shall be transferred, together with the records thereof, to the highest appellate court of the state, and shall be heard and determined thereby, and appeal to and writ of error from the Supreme Court of the United States shall lie to review all such cases in accordance with the rules and principles applicable to the review by that tribunal of cases determined by state courts; provided, further, that all cases so pending in said territorial Supreme Court in which the United States is a party or which, if instituted within a state, would have fallen within the exclusive original cognizance of a circuit or district court of the United States, shall, with the records appertaining thereto, be transferred to the circuit court of appeals for the ninth circuit, and be there heard and decided; and any such case which, if finally decided by the Supreme Court of the territory, would have been in any manner reviewable by the Supreme Court of the United States may, in like manner and with like effect, be so reviewed after final decision thereof by said circuit court of appeals. Transfers of all files and records from the said territorial Supreme Court to the highest appellate court of the state and to the said circuit court of appeals shall be accomplished in

such manner and under such proofs and authentications as the two last-mentioned courts shall respectively by rule prescribe.

All civil causes of action and all criminal offenses which shall have arisen or been committed prior to the admission of said territory as a state, but as to which no suit, action, or prosecution shall be pending at the date of such admission, shall be subject to prosecution in the courts of said state and the said circuit or district courts of the United States sitting therein, and to review in the appellate courts of such respective sovereignties in like manner and to the same extent as if said state had been created and such circuit, district, and state courts had been established prior to the accrual of such causes of action and the commission of such offenses; and in effectuation of this provision such of the said criminal offenses as shall have been committed against the laws of the said territory shall be tried and punished by the appropriate courts of the said state, and such as shall have been committed against the laws of the United States shall be tried and punished in the circuit or district courts of the United States.

All suits and actions brought by the United States in which said territory is named as a party defendant which shall be pending in any court of said territory at the date of its admission hereunto shall be transferred as herein provided, and the said state shall be substituted therein and become a party defendant thereto in lieu of said territory.

§34. That the members of the legislature elected at the election hereinbefore provided for may assemble at Phoenix, organize and elect two senators of the United States, in the manner now prescribed by the constitution and laws of the United States; and the governor and secretary of state of the proposed state shall certify the election of the senators and representatives in the manner required by law, and the senators and representatives so elected shall be entitled to be admitted to seats in congress and to all

rights and privileges of senators and representatives of other states in the congress of the United States; and the officers of the state government formed in pursuance of said constitution, as provided by the constitutional convention, shall proceed to exercise all the functions of state officers; and all laws of said territory in force at the time of its admission into the Union shall be in force in said state until changed by the legislature of said state, except as modified or changed by this act or by the constitution of the state; and the laws of the United States shall have the same force and effect within the said state as elsewhere within the United States.

§35. That the sum of one hundred thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the treasury not otherwise appropriated, for defraying all and every kind and character of expense incident to the elections and conventions provided for in this act: that is, the payment of the expenses of holding the election for members of the constitutional convention and the election for the ratification of the constitution, at the same rates that are paid for similar services under the territorial laws, and for the payment of the mileage for and salaries of members of the constitutional convention, at the same rates that are paid to members of the said territorial legislature under national law, and for the payment of all proper and necessary expenses, officers, clerks, and messengers thereof, and printing and other expenses incident thereto; provided, that any expense incurred in excess of said sum of one hundred thousand dollars shall be paid by said state. The said money shall be expended under the direction of the secretary of the interior, and shall be forwarded to be locally expended in the present territory of Arizona, through the secretary of said territory, as may be necessary and proper in the discretion of the secretary of the interior, in order to carry out the full intent and meaning of this act.

Approved June 20th, 1910.

No. 10560

United States
Circuit Court of Appeals
For the Ninth Circuit

E. J. JONES,

Appellant,

vs.

JIM BRUSH, State Treasurer of the State of Arizona, SIDNEY P. OSBORN, Governor of the State of Arizona, DAN E. GARVEY, Secretary of State of the State of Arizona, MARICOPA COUNTY, JOHN A. FOOTE, ED. OGLESBY and PHIL ISLEY, Constituting the Board of Supervisors of Maricopa County, Arizona,

Appellees.

APPEAL FROM UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF ARIZONA

APPELLANT'S REPLY BRIEF

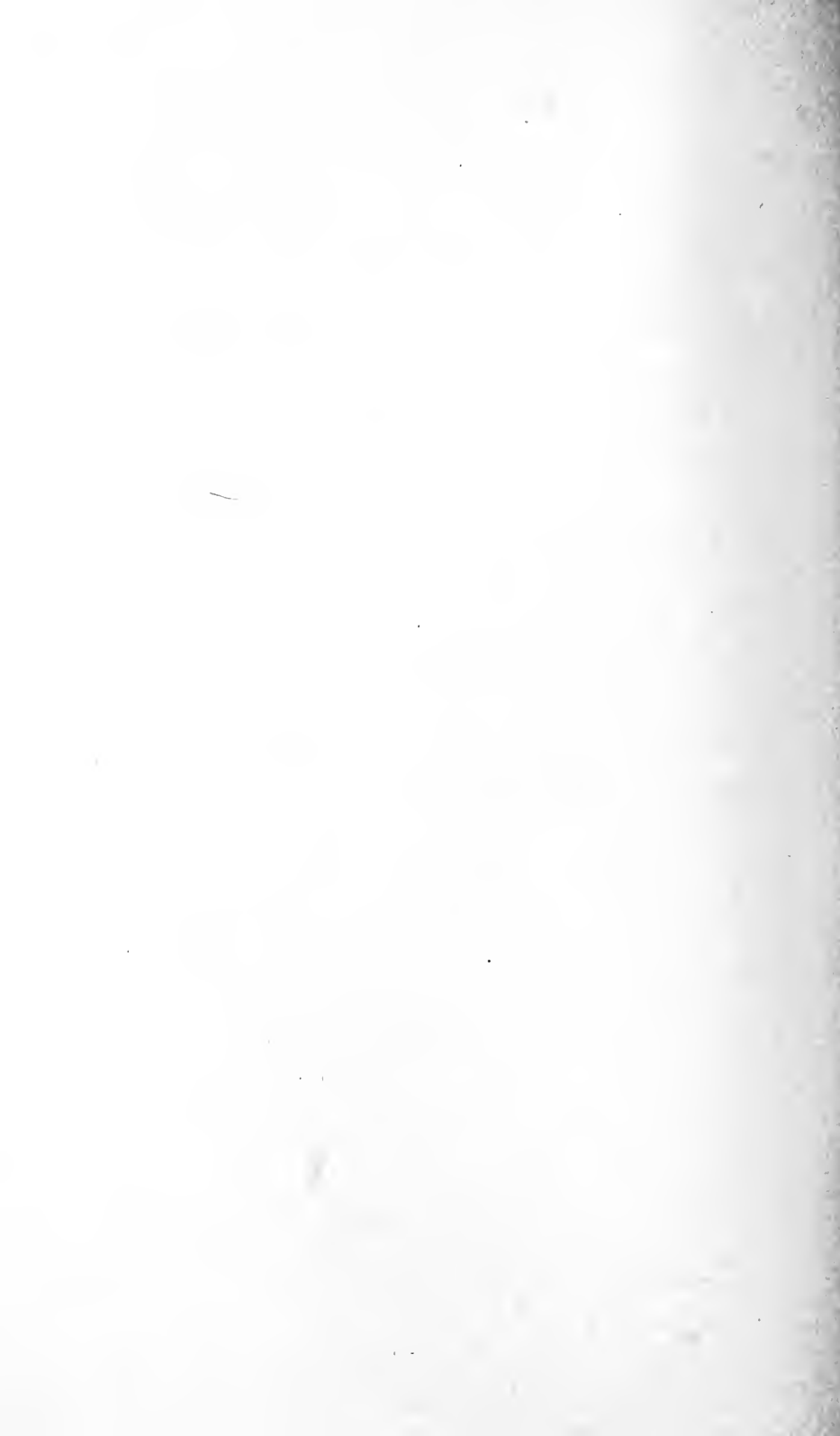
FILED

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No. 10560

United States
Circuit Court of Appeals
For the Ninth Circuit

E. J. JONES,

Appellant,

vs.

JIM BRUSH, State Treasurer of the State of Arizona, SIDNEY P. OSBORN, Governor of the State of Arizona, DAN E. GARVEY, Secretary of State of the State of Arizona, MARICOPA COUNTY, JOHN A. FOOTE, ED. OGLESBY and PHIL ISLEY, Constituting the Board of Supervisors of Maricopa County, Arizona,

Appellees.

APPEAL FROM UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF ARIZONA

APPELLANT'S REPLY BRIEF

The briefs heretofore filed in this case, and Case No. 10493, in this court, appear to cover every con-

tention advanced by appellees, except the proposition that this is a suit against the state. This proposition, to which the major part of the first 37 pages of ap-

pellees' brief is devoted, is without merit, for the following reasons:

1. The title of the lands donated to the state by the Enabling Act is subject to certain conditions and restrictions imposed by the United States, as donor. One of these conditions is that said lands and the proceeds therefrom shall be used for certain specified purposes, and use thereof for any other purpose shall be prevented by proceedings brought by the United States Attorney General, and may be prevented by the state or any citizen thereof. These conditions and restrictions are accepted by the state in the State Constitution.

Par. Twelfth, Art. 20 Ariz. Constitution

Secs. 1, 2, 7, 8, Art. 10, Ariz. Constitution.

See Secs. 1, 2, Exhibit A, Appellees' Brief.

It follows that any state official who uses his official position to dispose of any of said lands or the proceeds thereof, in a manner otherwise than in faithful compliance with the provisions of the Enabling Act, is acting, not on behalf of the State, but in violation of the Constitution of the State as well as the Enabling Act, and any suit brought to restrain such acts on his part is not a suit against the State, but is a

suit against a recreant or misguided state official to compel him to observe the State Constitution as well as the federal laws.

Ex Parte Young, 209 U. S. 123, 52 L. Ed. 714,
28 Sup. Ct. Rep. 441,

Hopkins v. Clemson College,
221 U. S. 636;
55 L. Ed. 890;
31 Sup. Ct. Rep. 654.

2. The State has expressly consented to the provisions of the Enabling Act.

Par. Twelfth, Art. 20, Ariz. Constitution.
And such consent is a waiver of the state's immunity from suit, for Sec. 28 of the Enabling Act expressly provides for the enforcement of the Enabling Act by suit. (p. xix, Exhibit B, appellees' brief).

Clark v. Barnard, 108 U. S. 436, 437;
27 L. Ed. 780;
2 Sup. Ct. Rep. 878.

Georgia v. Chattanooga, 264 U. S. 472;
68 L. ed. 796;
44 Sup. Ct. Rep. 369.

3. The jurisdiction of the federal courts to enforce the restrictions imposed upon the disposition of funds derived from the sale of lands donated by state Enabling Acts, is established by the authorities.

King County v. Seattle School Dist.,
263 U. S. 361;
68 L. Ed. 339;
44 Sup. Ct. Rep. 127.

Ervien, Commissioner of Public Lands, vs. U. S.
251 U. S. 41;
64 L. Ed. 128;
40 Sup. Ct. Rep. 75.

4. Such a suit as is brought by plaintiff in this case is not a suit against the State, but is a suit against certain persons who are proposing to use their official position to violate both the Constitution of the State, and the Enabling Act. Under the laws of Arizona, a citizen and taxpayer may sue to restrain them from such violation. There is nothing in the State law restricting such an action to the State courts. Furthermore, whenever a citizen of the State may maintain an action to establish a right, privilege or annuity under a federal act, he may bring an action in the Federal courts, under *Sec. 41, Title 28, U. S. Code Ann.* The right of the plaintiff as an individual to enforce the provisions of the Enabling Act is derived from the State law, but the nature and character of the right is determined by the Enabling Act. The Enabling Act is accepted by the Constitution of the State. This acceptance creates a contract between the United States and the State. Rights claimed under this contract are necessarily determined by the meaning and effect of the Enabling Act, and determination of such meaning and effect presents a federal question of which the Federal courts have jurisdiction under *Sec. 41, Title 28, U. S. Code Ann.*

5. The right of the plaintiff to sue as a citizen and taxpayer of the State is a general right to sue under the State law. Said right is not limited to the State courts, and under the Federal Constitution and *Section 41, Title 28, U. S. Code Ann.*, the Federal courts have jurisdiction of such a suit as they do of any other suit in which the rights sought to be enforced depend upon the proper meaning and effect of a Federal law.

6. The provisions of *Sec. 28 of the Enabling Act*, for the enforcement of the trusts created by that Act, expressly provide that the Attorney General of the United States may bring the action to enforce the trusts in the Federal court, and then, further provide that the right of action in the United States Attorney General shall not limit the power of the State or any citizen thereof to enforce the provisions of the Act. This clearly indicates that the right of the United States Attorney General and the State and the citizens thereof, to enforce the Act, have the same object—that is, to enforce the provisions of the trust created by the Enabling Act. If appellees' contention were adopted and it were held that the State or its citizens could sue only in the State courts, the result would be that there would be two independent provisions for the enforcement of the trusts in different courts, who might reach different conclusions. The result might be that if a case like this were brought in the State court and a judgment entered in favor of the defendants, and another suit were brought by the United States Attorney General in the Federal courts, a different judgment might be entered, with the result that there would be a judgment in the State courts holding one thing, and a

judgment in the Federal courts reaching a different result, and each of them be final. Such a result is not contemplated by the provisions of the Enabling Act. Said act simply provides that the United States Attorney General may enforce the act, and that the State and its citizens may enforce the act. Undoubtedly, the latter may resort to the State courts, but if they do, a decision of the State courts is subject to writ of certiorari and appeal, the same as any other proceeding in the State courts involving the construction of a Federal Act, and likewise, the State, or its citizens, may resort to the Federal courts in the first instance, upon the ground that a federal question is involved.

7. The argument that the action of the State officials is not subject to judicial review is without merit.

Rowland v. State Loan Board, 24 Ariz. 116,
207 Pac. 359.

Ervien v. Commissioner of Public Lands,
251 U. S. 41;
64 L. Ed. 128;
40 Sup. Ct. Rep. 75.

See pages 53-57, Appellant's Brief.

For the foregoing reasons, appellees' contention that this suit is a suit against the State, is wholly without merit.

The other contentions in appellees' brief have been

fully considered in appellant's opening brief, and in the briefs in Case No. 10493. We respectfully submit that the decision of the District Court must be reversed.

Respectfully submitted,

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No. 10571

United States
Circuit Court of Appeals

For the Ninth Circuit.

UNION PAVING CO., a corporation, PACIFIC
INDEMNITY COMPANY, a corporation and
MARYLAND CASUALTY COMPANY, a
corporation,

Appellants,

vs.

UNITED STATES OF AMERICA, for use and
benefit of SOULE STEEL COMPANY, a cor-
poration,

Appellee.

Transcript of Record
In Two Volumes
VOLUME I
Pages 1 to 332

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

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No. 10571

United States
Circuit Court of Appeals

For the Ninth Circuit.

UNION PAVING CO., a corporation, PACIFIC
INDEMNITY COMPANY, a corporation and
MARYLAND CASUALTY COMPANY, a
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In the District Court of the United States in and
for the Northern District of California, South-
ern Division

No. 22308-R

UNITED STATES OF AMERICA, for Use and
Benefit of SOULE STEEL COMPANY, a
corporation,

Plaintiff,

vs.

UNION PAVING CO., a corporation, PACIFIC
INDEMNITY COMPANY, a corporation, and
MARYLAND CASUALTY COMPANY, a
corporation,

Defendants.

COMPLAINT

(By Subcontractor against Principal
and Sureties on Payment Bond) [1*]

Plaintiff complains of defendants and for cause
of action alleges:

I

That Soule Steel Company, the party for whose
use and benefit this action is brought, is, and at all
times herein mentioned has been, a corporation
duly organized and existing under and by virtue of
the laws of the State of California and having its
principal office and place of business in the City
and County of San Francisco, State of California.

*Page numbering appearing at foot of page of original certified
Transcript of Record.

II

That Union Paving Co. is, and at all times herein mentioned has been, a corporation duly organized and existing under and by virtue of the laws of the State of Nevada and engaged, and authorized to engage, in business in the State of California and having its principal office and place of business within the State of California, in the City and County of San Francisco.

III

That Pacific Indemnity Company is, and at all times herein mentioned has been, a corporation duly organized and existing under and by virtue of the laws of the State of California and doing, and authorized to do, a surety business in the State of California.

IV

That Maryland Casualty Company is, and at all times herein mentioned has been, a corporation duly organized and existing under and by virtue of the laws of the State of Maryland, and doing, and authorized to do, a surety business in the State of California, and having its principal office and place of business within the State of California, in the City and County of San Francisco. [2]

V

That heretofore, to-wit, on or about November 4, 1939, defendant Union Paving Co. made and entered into a contract in writing with The United States of America, acting by and through the Bu-

reau of Relocation, Department of the Interior, for the construction by said Union Paving Co. of public work of the United States, namely, abutments and piers, Pit River Bridge Relocation of Southern Pacific Railroad and U. S. Highway 99, Kennett Division, Central Valley Project, California; that the contract price to be paid for said work under said contract was the sum of \$1,138,-288.00; and that said contract was to be performed and executed in the Northern District of California.

VI

That before said contract was awarded to said Union Paving Co., said corporation furnished to the United States a payment bond, dated November 4, 1939, in which said Union Paving Co., as principal, and said Pacific Indemnity Company and said Maryland Casualty Company, as sureties, are held and firmly bound unto the United States of America in the penal sum of \$455,315.20, for the payment of which sum well and truly to be made, said principal and said sureties bound themselves, their heirs, executors, administrators and successors as in said bond specified; that the condition of said bond was that, whereas said Union Paving Co. entered into said contract of November 4, 1939, with The United States of America, now, therefore, if said Union Paving Co. should promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly

authorized modifications of said contract which might thereafter be made, notice of which modifications to the sureties was expressly waived, then the obligation of the bond should be void but otherwise to remain in full force [3] and virtue; that said bond was intended to protect and did protect said Soule Steel Company, which corporation, as hereinafter specified, supplied labor and material as subcontractor in the prosecution of the work provided for in said contract of November 4, 1939: that a full, true and correct copy of said payment bond is annexed hereto, marked Exhibit "A", and is hereby referred to and incorporated herein the same as if fully set forth herein; and that said contract of November 4, 1939 was attached to said bond.

VII

That subsequent to the execution of said contract and payment bond, and on or about January 6, 1940, plaintiff entered into a subcontract in writing with defendant Union Paving Co., wherein and whereby plaintiff agreed to furnish and supply certain labor, materials, tools and equipment and to perform certain services, as in said subcontract provided, being a portion of the labor, materials, tools, equipment and services which said Union Paving Co. had, in said contract of November 4, 1939, agreed to furnish and supply to the United States of America; that plaintiff agreed to furnish and supply said labor, materials, tools, equipment and services on the terms and conditions and for the compensation set forth in said subcontract of

January 6, 1940, between plaintiff and defendant, Union Paving Co.; and that a full, true and correct copy of said written subcontract is annexed hereto, marked Exhibit "B", and is hereby referred to and incorporated herein the same as if fully set forth herein.

VIII

That between January 6, 1940 and May 31, 1941, plaintiff, acting under and in accordance with the terms and provisions of said subcontract of January 6, 1940, furnished and supplied all of said labor, materials, tools and equipment and performed all of said services to and for said Union Paving Co., all of which were necessary for and were actually used in the prosecution of the work [4] provided for in said contract of November 4, 1939, and that Union Paving Co. contracted and agreed to pay to plaintiff for the same the sum of \$124,393.13; that, at the special instance and request of said Union Paving Co. plaintiff sold and delivered certain additional goods, wares and merchandise and performed certain additional services to and for said Union Paving Co., all of which were necessary for and were actually used in the prosecution of the work provided for in said contract of November 4, 1939, having the reasonable value of \$671.84 and that said Union Paving Co. promised and agreed to pay said sum to plaintiff for the same; that on May 31, 1941, plaintiff furnished the last of said labor, materials, tools and equip-

ment and performed the last of said services hereinbefore in this paragraph referred to; and that plaintiff has fully performed all the terms and conditions of said subcontract by it to be performed.

IX

That on account of the matters hereinbefore in this complaint alleged said defendants, and each of them, became indebted to plaintiff in the sum of \$125,064.97; that on or before July 18, 1941 there had been paid or credited on account of said indebtedness the sum of \$47,712.35 and no more; and that on said July 18, 1941 there was due, owing and unpaid from said defendants, and each of them, to plaintiff on account of the matters hereinbefore alleged, the sum of \$77,352.62.

X

That, on or about July 18, 1941, plaintiff demanded from defendants, and each of them, the payment of said sum of \$77,352.62, together with interest thereon at the rate of seven per cent (7%) per annum from said July 18, 1941 to date of payment, but that defendants, and each of them, have failed and refused to pay the same or any part thereof, with the exception of the sum of [5] \$16,000.00 which was paid by Union Paving Co. on December 31, 1941, and that from and after January 1, 1942, there was due, owing and unpaid from said defendants, and each of them, and there is now due, owing and unpaid from said defendants, and each of them, to plaintiff on account of the

matters hereinbefore alleged the sum of \$61,352.62, together with interest on said sum of \$77,352.62 from July 18, 1941 to and including December 31, 1941, at the rate of 7% per annum, and interest on said sum of \$61,352.62 at the rate of 7% per annum from January 1, 1942.

Wherefore, plaintiff prays judgment against said defendants, and each of them, for the sum of \$61,352.62, together with interest on the sum of \$77,352.62 from July 18, 1941 to and including December 31, 1941, at the rate of 7% per annum, and interest on the sum of \$61,352.62 at the rate of 7% per annum from January 1, 1942; for its costs of suit incurred herein; and for such other and further relief as to the Court may seem meet and proper in the premises.

Dated: September 17, 1942.

MAX THELEN

THELEN & MARRIN

Attorneys for Soule Steel
Company,

111 Sutter Street,

San Francisco, California. [6]

State of California,

City and County of San Francisco—ss.

D. J. Stoddard, being first duly sworn, deposes and says:

That Soule Steel Company, for whose use and benefit the above action is brought, is a corporation; that affiant is an officer of said corporation,

to-wit, the Secretary thereof, and that as such officer he makes this verification for and on behalf of said corporation; that affiant has read said complaint and knows the contents thereof and that the same is true of his own knowledge except as to matters which are therein stated on information and belief, and as to those matters, that he believes it to be true.

D. J. STODDARD

Subscribed and sworn to before me this 17th day of September, 1942.

[Seal] LULU P. LOVELAND

Notary Public in and for the City and County of San Francisco, State of California. [7]

EXHIBIT "A"

U. S. Standard Form No. 25-A

Approved by the Secretary of the Treasury
Sept. 16, 1935

PAYMENT BOND

(Construction)

Pursuant to the Act of Congress, Approved
August 24, 1935
49 Stat. 1011

Know all men by these presents, That we, Union Paving Co., a corporation organized and existing under the laws of the State of Nevada, as Principal, and Pacific Indemnity Company, a California corporation, and Maryland Casualty Company, a

Maryland Corporation, as Surety, are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal sum of four hundred fifty-five thousand three hundred fifteen and 20/100 (\$455,315.20) dollars for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, firmly by these presents, as follows:

(See Rider Attached)

The Condition of this Obligation is such, that whereas the principal entered into a certain contract, hereto attached, with the Government, dated November 4, 1939, for construction of abutments and piers, Pit River Bridge, relocation of Southern Pacific Railroad and U. S. Highway 99, under the schedule of Specifications No. 877, Kennett Division, Central Valley project, California.

Now, Therefore, If the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue.

In Witness Whereof, the above-bounden parties have executed this instrument under their several seals this 4th day of November, 1939, the name and corporate seal of each corporate party being hereto

affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

UNION PAVING CO.

(Corporate principal)

310 California Street, San
Francisco, Calif.

(Business address)

(Affix Corporate Seal)

By A. LAWTON (Seal)

Title: President

Attest:

R. HILDEBRAND [8]

This Rider is attached to and forms a part of the bond executed on behalf of Union Paving Co. in the amount of four hundred fifty-five thousand three hundred fifteen and 20/100 (\$455,315.20) dollars, for construction of abutments and piers, Pit River Bridge, relocation of Southern Pacific Railroad and U. S. Highway 99, under the schedule of Specifications No. 877, Kennett Division, Central Valley project, California, contract dated November 4, 1939.

The Principal and the Pacific Indemnity Company, as Surety, jointly and severally in the sum of three hundred sixty-four thousand two hundred fifty-two and 16/100 (\$364,252.16) dollars and no more;

The Principal and the Maryland Casualty Company, as Surety, jointly and severally in the sum of

ninety-one thousand sixty-three and 04/100 (\$91,063.04) dollars and no more.

PACIFIC INDEMNITY COM-
PANY

100 Sansome Street, San
Francisco

By W. F. AMES, JR., (Seal)
Attorney in fact

Attest:

N. E. HANSSEN

MARYLAND CASUALTY
COMPANY

210 Sansome Street, San
Francisco

By W. G. KELSO, (Seal)
Attorney in fact

Attest:

MARIE K. PHILIPPS

U. S. Standard Form No. 25-A—(Approved
Sept. 16, 1935)

Sheet 2

CERTIFICATE AS TO CORPORATE
PRINCIPAL

I, R. Hildebrand, certify that I am the secretary of the corporation named as principal in the within bond; that A. Lawton, who signed the said bond on behalf of the principal, was then President of said corporation; that I know his signature, and his signature thereto is genuine; and that said bond

was duly signed, sealed, and attested for and in behalf of said corporation by authority of its governing body.

R. HILDEBRAND (Seal)
(Corporate Seal) [9]

EXHIBIT "B"

MEMO OF AGREEMENT

Memo of Agreement by and between Union Paving Co., a Nevada corporation, hereinafter called the Contractor, and Soule Steel Company, a California corporation, hereinafter called the Subcontractor.

Witnesseth:

Whereas, on or about the 4th day of November, 1939 said contractor duly entered into a contract with The United States of America by the Bureau of Reclamation, for the construction of piers and abutments for the relocation of the Southern Pacific Railway and U. S. Highway 99 over the Pit River, Kennett Division, Central Valley Project, California, and

Whereas, said contractor is desirous of subletting a portion of said work to said subcontractor and said subcontractor has agreed to do and perform certain portions of said work and to be bound by the terms and conditions of the plans, specifications and contract for said work in all respects, as if said subcontractor were a party to said con-

tract in lieu of said contractor, except as otherwise herein provided.

Now, therefore, said contractor and said subcontractor for the consideration hereinafter named agree as follows:

23—Materials furnished by the Government:

The subcontractor at its own cost agrees to provide all labor, materials, tools and equipment or other means and promptly unload all reinforcement bars from cars delivered at Redding, California check and haul the same to the job site and provide suitable warehouse or other means of protection for any material requiring storage or protection, in accordance with the provisions of paragraph 23 of said specifications applicable to the unloading, handling and placement of reinforcing bars.

24—Materials to be furnished by the subcontractor:

The subcontractor at its own cost agrees to provide all labor, wire, wire ties, rods or other materials and appliances used for securing reinforcement bars, metal or other temporary supports, if used, to hold reinforcement bars during the placing of concrete, including backing-up strip required for welding, in accordance with the provisions of paragraph 24 of said specifications.

45—Welding reinforcing bars:

The subcontractor at its own cost agrees to provide all labor, materials and equipment and cut the ends of the bars for welding and provide all clamps, tie rods, cables, blocking, anchors, and other acces-

sories that may be required, including the placement of backing-up strips and shall firmly and securely hold the reinforcing bars in position while the joints are being welded in accordance with the provisions of paragraph 45 of said speci- [10]fications, excepting therefrom only the labor, materials and equipment necessary for the welding of the joints for which work other contractors will be employed.

66—Reinforcement bars:

The subcontractor at its own cost agrees to provide all labor, materials, tools, accessories and equipment and perform and observe all the provisions contained in paragraph 66 of said specifications.

Time is of the essence of this agreement and the subcontractor agrees that it will proceed with the placing of reinforcement bars in sections of the piers and abutments made ready for such placement immediately after being notified by the contractor of the readiness of each section and prosecute the same diligently to completion, unless prevented by strikes, lockouts or other contingencies beyond its control.

The subcontractor agrees that the contractor shall have the right to use its rigs and equipment upon the job for the purpose of lifting and hoisting materials, equipment and forms at all times, when the same is not in use by the subcontractor, free from any charge, except that said contractor agrees to assume all risk or loss to said equipment, from said contractor's use thereof, and shall save the

subcontractor harmless from any damage, claim on loss arising from said use.

The contractor at its own cost agrees to provide an accessible roadway from Highway 99 to the base of all piers and abutments; construct a wooden trestle over and about the base of all pier excavations and construct wooden cores as shown on the plans which may be used by the subcontractor as a supplementary support for reinforcement bars; said subcontractor assuming the risk of any damage to said trestles or cores arising directly or indirectly from the use thereof and shall save and hold harmless said contractor from any damages, claims or losses.

The contractor at its own cost agrees to provide sufficient electric current at or near the base of each pier and install electric energy for the operation of the subcontractor's equipment.

The contractor at its own cost agrees to provide and pour necessary concrete sills in the base of all piers sufficient to support reinforcing steel mats.

The contractor agrees to pay said subcontractor for placing reinforcement bars at the rate of \$22.50 per ton for reinforcement bars actually placed in accordance with the plans and specifications which shall be considered as full compensation for unloading, warehousing, hauling, bending and placing reinforcement bars and clamps, and doing all work necessary or incidental thereto and for furnishing all tie wire, clamps and supporting devices.

The contractor shall not be answerable or accountable for any loss or damage that may happen to the

work of said subcontractor or any part thereof; or for any of the materials or other things used or employed in performing said work by the subcontractor; or for injury to any person, either workman or the public; for damage to property from any cause which might have been prevented by the subcontractor or his workmen; against all of which [11] injuries and damage to persons and property with said subcontractor having control over such work must properly guard.

Said subcontractor shall indemnify and save harmless said contractor from all suits or actions of every nature, brought for or on account of any injury or damage received or sustained by any person or persons, by or from said subcontractor, his servants or agents, in the construction of said subcontractor's work or by or in consequence of any negligence in guarding the same; improper materials used in construction or by or on account of any act or omission of said subcontractor or its agents.

Neither this agreement nor the work to be performed hereunder is assignable.

Payments are to be made to subcontractor on or about the 10th of the following month for 85% of the value of the work performed during the preceding month, and the remaining 15% to be paid thirty days after completion of said subcontractor's portion of the work.

In witness whereof, the parties hereto have exe-

cuted this agreement on this 6th day of January, 1940.

UNION PAVING CO
By J. A. DOWLING
SOULE STEEL COMPANY
By EDW. L. SOULE

[Endorsed]: Filed Sept. 17, 1942. [12]

[Title of District Court and Cause.]

ASSOCIATION OF ATTORNEYS

We, Max Thelen, and Thelen & Marrin, attorneys for the plaintiff in the above entitled action, hereby associate with us as attorney of record for the plaintiff, Courtney L. Moore.

Dated: October 9, 1942

MAX THELEN

THELEN & MARRIN [13]

I, Courtney L. Moore, hereby accept the foregoing association and agree to act as one of the attorneys of record for the plaintiff.

Dated: October 9, 1942.

COURTNEY L. MOORE

The Soule Steel Company, for whose use and benefit the above action is brought, hereby consented to the foregoing association.

Dated: October 9, 1942.

SOULE STEEL COMPANY
By D. J. STODDARD
Secretary

[Endorsed]: Filed Oct. 13, 1942. [14]

[Title of District Court and Cause.]

ANSWER AND CROSS-CLAIM

ANSWER

Now come defendants Union Paving Co., a corporation, Pacific Indemnity Company, a corporation, and Maryland Casualty Company, a corporation, and, for answer to the complaint of plaintiff herein, admit, deny and allege as follows, to-wit:

I.

These defendants specifically admit allegations "I", "II", "III", "IV", "V", "VI", and "VII" of plaintiff's complaint herein. [15]

II.

These defendants admit that between January 6, 1940, and some day in June, 1941, plaintiff, acting under and in accordance with the terms and provisions of said subcontract of January 6, 1940, furnished and supplied certain of said labor, materials, tools and equipment, and performed certain of said services to and for said Union Paving Co., all of which were necessary for and were actually used in the prosecution of the work provided for in said contract of November 4, 1939, that Union Paving Co. agreed to pay to plaintiff for the same the sum of \$63,280.51, that at the special instance and request of said Union Paving Co. plaintiff sold and delivered certain additional goods, wares and merchandise and performed certain additional

services to and for said Union Paving Co., all of which were necessary for, and were actually used in, the prosecution of the work provided for in said contract of November 4, 1939, of the reasonable value of \$671.84, and that on or about some day in June, 1941, or thereabouts, plaintiff furnished the last of said labor, materials, tools and equipment and performed the last of certain services hereinbefore in this paragraph referred to; and except as thus admitted, these defendants deny, generally and specifically, the facts, matters and things in said allegation "VIII" set forth.

III.

Defendants admit that on account of the matters hereinbefore in this complaint alleged, defendant Union Paving Co. became indebted to plaintiff in the sum of \$63,952.35, that on or before July 18, 1941, there had been paid or credited on account of said indebtedness, the sum of \$47712.35, and that on said July 18, 1941, there was unpaid from defendant Union Paving Co. to plaintiff on account of the matters hereinbefore admitted the sum of \$16,240.00; and, except as thus admitted, defendants [16] deny generally and specifically, the facts, matters and things in allegation "IX" of plaintiff's complaint set forth.

IV.

Defendants admit that on or about July 18, 1941, plaintiff demanded from defendant Union Paving Co. the payment of the sum of \$77,352.62 and in-

terest, and defendants admit and allege that on or about December 31, 1941, defendant Union Paving Co. paid to plaintiff the sum of \$16,000.00; and, except as thus admitted and alleged, defendants deny generally and specifically the facts, matters and things in allegation "X" of plaintiff's complaint set forth. In this connection, defendants allege that on December 31, 1941, there was due, owing and unpaid from plaintiff to defendant Union Paving Co., on account of interest, a sum in excess of the \$240.00 apparent balance against defendant Union Paving Co. and in favor of plaintiff.

Wherefore, defendants pray that plaintiff take nothing by its complaint herein, but that the same be dismissed, and that defendants have judgment for their costs of suit and for such other and further relief as to the Court may seem meet and proper in the premises.

HENRY F. WRIGLEY

Attorney for Defendants. [17]

In the District Court of the United States in and for the Northern District of California Southern Division.

No. 22308R

UNION PAVING CO., a corporation,
Cross-plaintiff,
vs.

SOULE STEEL COMPANY, a corporation,
Cross-defendant.

CROSS-CLAIM

For further answer to the complaint herein, and by way of cross-claim, defendant and cross-plaintiff, Union Paving Co., a corporation, complains of plaintiff and cross-defendant, Soule Steel Company, a corporation, and for cause thereof, alleges:

I.

That Union Paving Co. is, and at all times herein mentioned has been, a corporation duly organized and existing under and by virtue of the laws of the State of Nevada, and engaged, and authorized to engage, in business in the State of California, and having its principal office and place of business within the State of California, in the City and County of San Francisco. [18]

II.

That Soule Steel Company is, and at all times herein mentioned has been, a corporation duly organized and existing under and by virtue of the

laws of the State of California, and having its principal office and place of business in the City and County of San Francisco, State of California.

III.

That heretofore, to-wit, on or about November 4, 1939, defendant and cross-plaintiff, Union Paving Co., made and entered into a contract in writing with The United States of America, acting by and through the Bureau of Reclamation, Department of the Interior, for the construction by said Union Paving Co. of public work of the United States, namely, abutments and piers, Pit River Bridge Relocation of Southern Pacific Railroad and U. S. Highway 99, Kennett Division, Central Valley Project, California; that the contract price to be paid for said work under said contract was the sum of \$1,138,288.00, or thereabouts; and that said contract was to be performed and executed in the Northern District of California; and that in and by the specifications, which were made a part of said written contract, it was provided and agreed as follows:

“23. Materials furnished by the Government.—The Government will furnish cement, sand, and broken rock or gravel for use in concrete; admixtures, if required, for use in concrete; cement and sand for use in mortar; clear curing compound for curing concrete, in accordance with the provisions of paragraph 64; reinforcement bars; rubber water stops, molded bituminous material, copper nails, and coating material for joints; metalwork for expansion joints; waterproofing paint; sewer pipe and

split sewer pipe for drains; metal drain inlets; metal pipe and fittings for drains; hardware cloth; corrugated-metal-pipe for anchor-bolt wells; metal forms for recesses for pipe-handrail post; metal drain troughs for drains at expansion joints in roadways on abutments 1 and 4; name plates and frames; metal ladders; steel covers for temporary manholes in piers 3 and 4; timber and anchor bolts for paving-notch buffers; electrical metal conduits, conduit boxes, fittings, and accessories; steel pipe for electrical cables; stress meters, cables, and terminal outlets; tubing and fittings for embedded cooling systems and cooling concrete; paint and coating materials; and also all other materials not specifically mentioned in this paragraph or in paragraph 24 that will become a part of the completed construction [19] work. Sand and broken rock or gravel will be delivered in the contractor's trucks at the gravel plant near Redding, California, as shown on the location map. All other material furnished by the Government will be delivered to the contractor f. o. b. cars at Redding, California. The contractor shall haul all of the materials from the points of delivery to the work; shall provide suitable warehouses or other means of protection satisfactory to the contracting officer for such of the materials as, in the opinion of the contracting officer, require storage or protection; and will be charged for any material lost or damaged after delivery, except as otherwise specifically provided, the same amounts that the materials cost the Government at the point of delivery to the contractor. The contractor shall be responsible for

the prompt unloading of the materials delivered on cars and for proper care of the materials and will be held liable for any demurrage charges incurred due to failure to unload cars promptly. The contractor shall report to the contracting officer, in writing, within 24 hours after unloading, any shortage in or damage to materials when delivered. The cost of unloading, hauling, storing and caring for all of the materials furnished by the Government shall be included in the prices bid in the schedule for the work in which the materials are to be used. The cost of handling and installing minor miscellaneous items of timber, metal and other work, for which specific prices are not provided in the schedule shall be included in the prices bid for the work to which they are appurtenant. The contractor shall return to the Government at Redding, California, or at points convenient to the work, as directed by the contracting officer, all unused materials and will be charged for any materials not used and not returned the same amounts that the materials cost the Government at the point of delivery to the contractor”

“24. Materials to be furnished by the contractor—The contractor will be required to furnish all form materials, including oil for oiling forms: all wire, wire ties; or other appliances used for holding forms and for securing reinforcement bars; metal or other temporary supports, if used, for reinforcement bars and other metalwork; welding rods for welding reinforcement bars; all backfill materials; all gravel and broken rock or boulders for dry-rock paving; gravel or broken rock for drain pockets; all water used for

mixing, cleaning, curing, and cooling concrete and mortar and for moistening backfill materials to be compacted; and also all other materials not a part of the completed construction work required for the completion of the contract. The contractor will be required to haul all of these materials as well as all of the materials delivered to the contractor by the Government. The cost of hauling all of the materials described above and of furnishing all of the materials required to be furnished by the contractor shall be included in the unit prices bid in the schedule for the work for which the materials and hauling are required."

"45. Welding reinforcement bars.—The 2-inch square bars for vertical reinforcement in the piers shall be welded together so as to provide continuous reinforcement without overlapping of the bars. The contractor shall properly cut the ends of the bars for welding and shall weld all bars, as shown on the drawings or as directed by the contracting officer. The Contractor shall provide all clamps, tie rods, cables, blocking, anchors, and other accessories that may be required for holding the reinforcement bars in position while the joints are being welded and shall furnish all welding electrodes and backing-up strips required for welding the reinforcement bars. The ends of the bars to be joined by welding shall be gas-cut, sawed, or sheared to the templates [20] shown on the drawings. Where the bars are sheared or gas-cut, the cut surfaces shall be machined or chipped to a depth of not less than one-sixteenth of an inch. Particular care shall be taken in aligning

and separating the ends of the bars to be joined by welding, and the ends of the bars shall be matched accurately and shall be retained in the position shown on the drawings during the welding operations. Suitable means shall be provided for holding the bars securely in position during the welding process. If clamps are used at the sections to be welded, means shall be provided for preventing welding of the clamps to the 2-inch bars. If the backing-up strips are used under the clamps at the ends of the welding grooves, each strip shall be a mild-steel bar not more than three-sixteenths of an inch thick. After the welding is completed, the backing-up strips may remain permanently welded to the bars or may be removed by chipping or other means: Provided, That any part of each backing-up strip that extends more than one-half of an inch beyond the surface of the 2-inch bar to which it is welded or beyond the zone of welding shall be removed. The ends of the bars shall be heated with a blow torch or other suitable means to a temperature of approximately 500° F. immediately before welding is commenced and shall be maintained at such temperature during the welding operations. Surfaces to be welded shall be clean and free from scale, rust, and foreign matter. All welding shall be performed by the electric-arc method, and the process and equipment used, the rate of depositing the weld metal, and the rate of voltage and current shall be subject to the approval of the contracting officer. Welding electrodes shall be of the heavily coated type and shall be specially designed for all-position welding. The coating shall be

of uniform thickness and shall be of such composition as, when decomposed during welding, will effectively shield the arc so as to exclude the atmosphere from the molten metal. Weld metal shall be deposited in successive layers, and each layer shall be cleaned of all slag and shall be peened before the next layer is applied. All welds shall have complete penetration and freedom from imperfection, and visual inspection of the edges of the welds shall indicate good fusion with the base metal. All welds shall be acceptable to the contracting officer. Defective welds shall be chipped to sound metal and the resulting cavity shall be filled in the same manner as the original grooves were filled or the bars shall be gas-cut and rewelded. The contractor shall be responsible for the quality of the work performed by his welding organization and shall employ as welders on the work of welding the reinforcement bars only skilled operators who have passed the tests hereinafter described. Before being permitted to weld reinforcement bars on the job, the operator shall weld two test bars of the 2-inch square reinforcement bars to be used on the work. The ends of the test bars shall be prepared in the manner prescribed for the ends of the bars to be welded in the work and shall be welded with the bars in the same position and using the same welding technique and the same kind of electrodes. The breaking strength and the yield point of the welded bars shall be not less than 80 percent of the specified minimum tensile strength and yield point of the metal in the bars. In order for a welder to be certified for the work, both test bars

must meet the strength requirements: Provided, That, if only one of the bars meets the requirements, the welder may be permitted to weld two additional test bars, and if these two bars meet the requirements, he will be certified. In addition to the above requirement, each welder will be required to make at least one full size test weld, as described above, for each 100 joints welded by him. The Government will provide reinforcement bars for the tests and will make the strength tests of the welded bars, but the contractor shall furnish all other labor and [21] materials required for making the test welds. No separate payment will be made for making the qualification tests, and except for the cost of the reinforcement bars furnished by the Government, the entire cost of making the qualification tests shall be included in the unit price bid in the schedule for welding reinforcement bars. The contracting officer shall have the right, at any time, to call for and witness the making of test welds by any welder, and to witness the *physcial* tests, which tests shall meet the requirements of this paragraph. Payment for welding reinforcement bars as described in this paragraph will be made at the unit price per weld bid therefor in the schedule."

"66. Reinforcement bars.—Steel reinforcement bars shall be placed in the concrete wherever shown on the drawings or where directed by the contracting officer. The reinforcement bars will be furnished to the contractor by the Government as provided in paragraph 23. Unless otherwise shown on the drawings or directed by the contracting officer, measure-

ments made in placing the bars shall be to the center lines of the bars. If more than one grade of reinforcement bar is furnished, the contractor shall use proper precautions, satisfactory to the contracting officer, to prevent the use of the wrong grade of reinforcement bar in any part of the work. The exact position, size, and shape of reinforcement bars are not shown in all cases on the drawings, and where not shown they shall be in all respects as specified by the contracting officer, and where necessary, as determined by the contracting officer, the contractor will be furnished supplemental detail drawings or lists which will give the information necessary for cutting, bending, and placing the reinforcement bars. Before the reinforcement bars are placed, the surfaces of the bars and the surfaces of any metal supports for reinforcement bars shall be cleaned of objectionable rust, scale, dirt, grease, or other foreign substances, and, after being placed, the reinforcement bars shall be maintained in a clean condition until they are completely embedded in the concrete. The Government will make every reasonable effort to have the reinforcement bars delivered to the contractor in good condition, but this shall not relieve the contractor from full responsibility for the condition of the bars immediately prior to covering them with concrete. Reinforcement bars shall be accurately placed and secured in position so that they will not be displaced during the placing of the concrete, and special care shall be exercised to prevent any disturbance of the reinforcement bars in con-

crete that has already been placed. Metal chairs, metal hangers, metal spacers, or other metal supports satisfactory to the contracting officer may be furnished and used by the contractor for supporting reinforcement bars. Wherever necessary, in the opinion of the contracting officer, to prevent future damage to the concrete or unsightly rust stains on exposed concrete surfaces, all such supports for reinforcement bars shall be made of noncorrodible metal. Payment for placing reinforcement bars will be made at the unit price per pound bid therefor in the schedule, which unit price shall include the cost of furnishing and attaching wire ties and metal supports if used, of unloading, hauling, sorting, storing, cutting, bending, cleaning, placing, and securing and maintaining in position all reinforcement bars, as shown on the drawings or as directed by the contracting officer."

IV.

That before said contract was awarded to said Union [22] Paving Co., said corporation furnished to the United States labor and material and payment bonds, dated November 4, 1939, in which said Union Paving Co., as principal, and said Pacific Indemnity Company and said Maryland Casualty Company, as sureties were held and firmly bound unto the United States of America in the penal sum of \$455,315.20, for the payment of which sum well and truly to be made, said principal and said sureties bound themselves, their heirs, executors, administrators and successors as in said bond specified, and said bonds were conditioned as in said contract of November 4, 1939,

and the law in such cases made and provided; and that said contract of November 4, 1939, was attached to said bonds.

V.

That subsequent to the execution of said contract and bonds, and on or about January 6, 1940, plaintiff and cross-defendant entered into a subcontract in writing with defendant and cross-plaintiff, Union Paving Co., wherein and whereby plaintiff and cross-defendant agreed to furnish and supply certain labor, materials, tools and equipment and to perform certain services as in said subcontract provided, being a portion of the labor, materials, tools, equipment and services which said Union Paving Co. had, in said contract of November 4, 1939, agreed to furnish and supply to the United States of America; that plaintiff and cross-defendant agreed to furnish and supply said labor, materials, tools, equipment and services on the terms and conditions and for the compensation set forth in said subcontract of January 6, 1940, between plaintiff and cross-defendant and defendant and cross-plaintiff, Union Paving Co.; and that a full true and correct copy of said written subcontract is annexed to plaintiff's complaint marked Exhibit "B", and is hereby referred to and incorporated herein the same as if fully set forth herein. [23]

VI.

That in and by the terms and provisions of said subcontract Exhibit "B" Cross-defendant, Soule Steel Company, as subcontractor, covenanted and agreed as follows:

“23—Materials Furnished by the Government:

“The subcontractor at its own cost agrees to provide all labor, materials, tools and equipment or other means and promptly unload all reinforcement bars from cars delivered at Redding, California, check and haul the same to the job site and provide suitable warehouse or other means of protection for any material requiring storage or protection, in accordance with the provisions of paragraph 23 of said specifications applicable to the unloading, handling and placement of reinforcing bars.”

“24—Materials to be Furnished by the Subcontractor:

“The subcontractor at its own cost agrees to provide all labor, wire, wire ties, rods or other materials and appliances used for securing reinforcement bars, metal or other temporary supports, if used, to hold reinforcement bars during the placing of concrete, including backing-up strip required for welding, in accordance with the provisions of paragraph 24 of said specifications”

“45—Welding Reinforcing Bars:

“The subcontractor at its own cost agrees to provide all labor, materials and equipment and cut the ends of the bars for welding and provide all clamps, tie rods, cables, blocking, anchors, and other accessories that may be required, including the placement of backing-up strips and shall firmly and securely hold the reinforcing bars in position while the joints are being welded in accordance with the provisions of paragraph 45 of said specifications, excepting

therefrom only the labor, materials and equipment necessary for the welding of the joints for which work other contractors will be employed.”

“66—Reinforcement Bars:

“The subcontractor at its own cost agrees to provide all labor, materials, tools, accessories and equipment and perform and observe all the provisions contained in paragraph 66 of said specifications.”

“Time is of the essence of this agreement and the subcontractor agrees that it will proceed with the placing of reinforcement bars in sections of the piers and abutments made ready for such placement immediately after being notified by the contractor of the readiness of each section and prosecute the same diligently to completion, unless prevented by strikes, lockouts or other contingencies beyond its control.”

“The subcontractor agrees that the contractor shall have the right to use its rigs and equipment upon the job for the purpose of lifting and hoisting materials, equipment and forms at all times, when the same is not in use by the subcontractor, free from any charge, except that said contractor agrees to assume all risk or loss to said equipment, from said contractor’s use thereof, and shall save the subcontractor harmless from any damage, claim or loss arising from said use.

“The contractor at its own cost agrees to provide an accessible roadway from Highway 99 to the base of all piers and [24] abutments; construct a wooden trestle over and about the base of all pier excavations and construct wooden cores as shown on the plans which may be used by the subcontractor as a

supplementary support for reinforcement bars; said subcontractor assuming the risk of any damage to said trestles or cores arising directly or indirectly from the use thereof and shall save and hold harmless said contractor from any damages, claims or losses.”

* * *

“The contractor agrees to pay said subcontractor for placing reinforcement bars at the rate of \$22.50 per ton for reinforcement bars actually placed in accordance with the plans and specifications which shall be considered as full compensation for unloading, warehousing, hauling, bending and placing reinforcement bars and clamps, and doing all work necessary or incidental thereto and for furnishing all tie wire, clamps and supporting devices.”

* * *

“Payments are to be made to subcontractor on or about the 10th of the following month for 85% of the value of the work performed during the preceding month, and the remaining 15% to be paid thirty days after completion of said subcontractor’s portion of the work.”

That Cross-defendant, Soule Steel Company, did not prosecute the work under said subcontract diligently and to completion as in said subcontract provided, and said cross-defendant failed, refused and neglected to do all work necessary and incident to the placing of said reinforcement bars, and in particular Soule Steel Company failed, refused and neglected to provide the necessary temporary supports

and supporting devices, and cross-plaintiff was required to and did provide and supply the said temporary supports and supporting devices; and that the reasonable cost of providing and supplying the said temporary supports and supporting devices was the sum of \$58,835.22.

VII.

That during the progress of the work under the said subcontract, and at the special instance and request of Soule Steel Company, Union Paving Co. performed certain services in connection with moving, raising and repairing of the boom used by said Soule Steel Company; and that the said services were of the agreed and the reasonable value of \$1,893.82, as more specifically set forth in the attached Exhibit "C", no part of which [25] said sum has been paid or credited to Union Paving Co.

IX.

That during the progress of the work under the said subcontract, and at the special instance and request of Soule Steel Company, Union Paving Co. performed other services for the said Soule Steel Company; that the said other services were of the agreed and the reasonable value of \$383.58, as more specifically set forth in the attached Exhibit "D", no part of which has been paid or credited to Union Paving Co.

X.

That by reason of the facts and services aforesaid, Soule Steel Company became, and is, indebted to

Union Paving Co. in the sum of \$61,112.62, with interest thereon at the rate of 7% per annum from the respective dates that the said acts and services were so performed by Union Paving Co., no part of which has been paid or credited to Union Paving Co.

Wherefore, Union Paving Co. respectfully requests that this Court determine and decree that Soule Steel Company became, and is, indebted to Union Paving Co. in the amount of \$61,112.62, and interest, by reason of the acts and facts hereinabove set forth; that Union Paving Co. recover its costs of suit herein, and that it have such other and further relief as to the Court may seem meet and proper in the premises

Dated: October 16th, 1942.

HENRY F. WRIGLEY

Attorney for Cross-plaintiff.

[26]

State of California,

City and County of San Francisco—ss.

A. Lawton, being first duly sworn, deposes and says: That he is an officer, to-wit: The President of Union Paving Co., a corporation, one of the defendants, and the cross-plaintiff, and that he makes this verification for and on behalf of said corporation and said defendants above named; that he has read the above and foregoing answer and cross-claim, and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

A. LAWTON

Subscribed and sworn to before me this 16th day of October, 1942.

[Seal]

CATHERINE E. KEITH

Notary Public, in and for the City and County of San Francisco, State of California.

Receipt of a copy of the above and foregoing answer and cross-claim is hereby admitted this 17th day of October, 1942.

MAX THELEN

THELEN & MARRIN

COURTNEY L. MOORE [27]

EXHIBIT "C"

Miscellaneous Charges Against Soule Steel Company Moving and Repairs to Boom.

	Amount.
7/ 9/40 Slacking guy wires	\$ 7.18
7/21/40 Setting Chicago boom—Pier 2	13.05
8/27/40 Raise derrick—Pier 7	75.24
9/10/40 Remove derrick—Pier 7	64.04
9/11/40 Repair boom—Pier 2	104.34
9/13/40 Raise boom—Pier 2	37.62
9/20/40 Raise boom—Pier 2	30.32
9/29/40 Repair boom—Pier 2	71.53
9/30/40 Repair boom—Pier 2	128.86
10/13/40 Lower boom—Pier 2—Move to Pier 3	90.43
10/15/40 Rigging for boom—Pier 3	45.21
1/21/41 Raise boom—Pier 3	22.46
1/24/41 Raise boom—Pier 3	60.08
1/24/41 Set bar—Pier 3	1.82
2/24/41 Change block on boom—Pier 3	14.59
3/ 5/41 Repair Chicago boom—Pier 4	14.55
Matls. 1-3c 30 Amp 600V. switch 1-15 HP magnetic switch & 1 push button station	20.60

Amount.

3/ 6/41	Raise Chicago boom—Pier 4	104.42
3/ 8/41	Lower Chicago boom—Pier 3	26.11
3/13/41	Repair Chicago boom—Pier 4	3.63
3/19/41	Raise Chicago boom—Pier 4	59.21
4/ 8/41	Raise boom—Pier 4	39.16
4/ 9/41	Raise boom—Pier 4	15.73
4/15/41	Repair signal line—Pier 4	3.14
4/23/41	Raise Chicago boom—Pier 4	64.68
4/24/41	Repairs Chicago boom—Pier 4	1.71
4/28/41	Repair signal line—Pier 4	1.71
5/ 1/41	Raise boom—Pier 4	37.62
5/ 4/41	Repair grids—Hoist—Pier 4	7.18
5/11/41	Repair grids—Hoist—Pier 4	1.03
5/12/41	Repair grids—Hoist—Pier 4	1.71
11/ 8/40	Raise boom—Pier 3	14.59
11/19/40	Raise boom—Pier 3	33.69
11/25/40	Bracing for guy derrick—Pier 4	30.61
11/27/40	Raise boom—Pier 3	28.22
12/16/40	Raise boom—Pier 3	88.82
1/ 9/41	Raise boom—Pier 3	44.62
	Materials furnished for signal system	
	Soule Steel Co. Hoist:	
	500 ft. #18 portable line	18.60
	1—110 V. Benjamine Honker	7.50
	3—Twist lock caps & bodies	3.00
	1—Weather proof lamp socket	.06
	1—30 watt lamp	.15
	1—30 amp switch & fuses	6.23
	2—Edwards push button switches	7.15
	Sales tax	1.29

 \$1453.49

Additional guy lines necessary on tower
at Piers 2, 3 and 4 to support Chicago
boom

2800 ft. @ 9¼c plus tax	268.16
10% overhead	172.17

 \$1893.82

[28]

EXHIBIT "D"

Miscellaneous Charges Against Soule Steel
Company

Additional Miscellaneous Charges:

5/29/40	Wage outlay caused by incomplete steel placement Pier 1	\$ 38.91
7/ 8/40	Wage outlay caused by incomplete steel placement Abutment 4	22.28
8/9 & 10	Set boom on tower—Pier 2	105.15
8/20/40	Erect rig, raise boom—Pier 2	57.43
10/15 & 17	Raise and repair boom—Pier 6	135.14
9/ 5/40	Clear space for steel—Pier 5	3.13
2/12/40	Operator for air compressor—Pier 4	10.03
4/15/41	Labor for Soule so-called "additional bracing"—Pier 4	8.38
5/20/41	Labor for Soule so-called "additional bracing"—Pier 4	3.13
		<hr/>
		\$383.58

Receipt of Service

[Endorsed]: Filed Oct. 17, 1942. [29]

In the District Court of the United States, in and
for the Northern District of California South-
ern Division

No. 22,308-R

UNITED STATES OF AMERICA for use and
benefit of SOULE STEEL COMPANY, a cor-
poration,

Plaintiff,

vs.

UNION PAVING CO., a corporation, PACIFIC
INDEMNITY COMPANY, a corporation, and
MARYLAND CASUALTY COMPANY, a cor-
poration,

Defendants.

ANSWER TO CROSS-CLAIM

Now Comes the Soule Steel Company, a corpora-
tion, and answering the cross-claim of the Union
Paving Company, a corporation, admits, denies and
alleges as follows:

I.

Admits the allegations contained in Paragraphs
I, II, III, IV and V of the cross-claim.

II.

Denies generally and specifically, each and all of
the allegations contained in Paragraphs VII, VIII,
and IX of the cross-claim (erroneously numbered
Paragraphs VII, IX and X). [30]

III.

Answering paragraph VI of the cross-claim, admits that the portions of the contract as quoted therein are correctly quoted, and that said quotations formed a portion of the contract between the parties, but that they do not constitute the entire contract. That said contract in its entirety is set forth as Exhibit "B" to the complaint on file herein, which exhibit is hereby by reference made a part hereof.

In this connection cross-defendant alleges that in the erection of the piers and abutments and of the sections thereof it was necessary for said cross-complainant to erect falsework and also temporary scaffolding, which said scaffolding was to be used in the pouring of concrete, and it was understood and agreed between the parties that said cross-plaintiff would erect at its cost said falsework and scaffolding in advance of the placing of the reinforcement bars, and would notify cross-defendant when said scaffolding was so erected, and that after said notification, said cross-defendant would place, secure and maintain said reinforcement bars in position by attaching same to the falsework or scaffolding through the medium of templates and other supporting devices. Said contract providing:

"Time is of the essence of this agreement and the sub-contractor agrees that it will proceed with the placing of reinforcement bars in sections of the piers and abutments made ready for such placement immediately after being notified by the contractor of the readiness of each sec-

tion and prosecute the same diligently to completion, unless prevented by strikes, lockouts or other contingencies beyond its control.”

The cross-defendant upon being notified by the cross-plaintiff of the readiness of said piers and abutments proceeded with the placement of said reinforcement bars and supported the same in place by attachment through the medium of templates [31] or other supporting devices to the said scaffolding and falsework so erected as aforesaid by said cross-plaintiff.

Cross-defendant paid all the expenses and costs of so placing and supporting the said reinforcement bars, and none of the same was paid or supplied by the cross-plaintiff.

That the said sum of Fifty Eight Thousand Eight Hundred Thirty Five and 22/100 (\$58,835.22), or any other sum which is claimed to have been expended by said cross-plaintiff was not expended in supplying or providing temporary supports or supporting devices for said reinforcement bars, but was used in the erection of the said scaffolding or falsework which was used by the cross-plaintiff in the pouring of concrete.

Wherefore cross-defendant prays that cross-plaintiff take nothing by reason of said cross-claim.

Dated: November 20th, 1942.

COURTNEY L. MOORE,
MAX THELEN,
THELEN & MARRIN,

Attorneys for cross-defendant.

State of California,

City and County of San Francisco—ss.

D. J. Stoddard, being first duly sworn, deposes and says:

That Soule Steel Company, for whose use and benefit the above action is brought, is a corporation; that affiant is an officer of said corporation, to-wit, the Secretary thereof, and that as such officer he makes this verification for and on behalf of said corporation; that affiant has read said complaint and knows the contents thereof and that the same is true of his own knowledge except as to matters which are therein stated on information or belief, and as to those matters, that he believes it to be true.

D. J. STODDARD

Subscribed and sworn to before me this 20th day of November, 1942.

[Seal]

LOUIS WIENER.

Notary Public in and for the City and County of San Francisco, State of California.

(Receipt of Service.)

[Endorsed]: Filed Nov. 21, 1942. [33]

In the District Court of the United States, in and
for the Northern District of California South-
ern Division

No. 22,308-R

UNITED STATES OF AMERICA for use and
benefit of SOULE STEEL COMPANY, a cor-
poration.

Plaintiff and
Cross-Defendant.

vs.

UNION PAVING CO., a corporation, et al,
Defendants and
Cross-Complainants.

AMENDMENT TO THE ANSWER TO
CROSS-COMPLAINT

Now Comes the above named cross-defendant and
by stipulation between the parties, amends the an-
swer to the cross-complaint by adding to Paragraph
III of said answer the following:

Except as to the facts thus admitted, this cross-
defendant denies generally and specifically all facts,
matters and things set forth in the allegations of said
Paragraph VI of said cross-complaint.

Dated: November 25th, 1942.

COURTNEY L. MOORE.

MAX THELEN.

THELEN & MARRIN. [34]

STIPULATION PERMITTING PLAINTIFF
TO AMEND ANSWER TO THE CROSS-
COMPLAINT

It Is Hereby Stipulated and Agreed that the answer to the cross-complaint may be amended as aforesaid.

Dated: November 25th, 1942.

HENRY F. WRIGLEY,
Attorney for Defendants and
Cross-Complainants

It Is So Ordered.

Dated: November 30th, 1942.

MICHAEL J. ROCHE,
Judge of the District Court.

[Endorsed]: Filed Nov. 30, 1942. [35]

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Mon-

day, the 19th day of April, in the year of our Lord one thousand nine hundred and forty-three.

Present: the Honorable Michael J. Roche, D. J.

[Title of Cause.]

No. 22308-R. Civil

**ORDER DENYING MOTION TO STRIKE
CERTAIN TESTIMONY**

The parties hereto being present as heretofore, the further trial of this case was this day resumed. Mr. Wrigley made a motion to strike certain testimony, and after argument by Mr. Wrigley and Mr. Moore, it is Ordered that said motion to strike certain testimony be denied. The evidence being closed, and the case, after argument by the attorneys, being submitted and fully considered, it is Ordered that judgment be entered in favor of plaintiff on findings of fact and conclusions of law, and that the defendant take nothing on the cross-claim. [36]

[Title of District Court and Cause.]

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

The above-entitled cause coming on regularly for trial before the Honorable Michael J. Roche, on the 8th day of April, 1943, continuing with intermissions to the 19th day of April, 1943, was thereupon submitted to the Court for decision. Plaintiff appeared by attorneys Messrs. Thelen & Marrin, and Courtney L. Moore, Esq., and defendants, Union Paving Co.,

a corporation, Pacific Indemnity Company, a corporation, and Maryland Casualty Company, a corporation, appeared by attorney Henry F. Wrigley, Esq., and evidence both oral and documentary having been introduced, the Court thereafter announced its decision, [37]

Now, Therefore, the Court having been fully advised in the premises, makes the following written findings of fact and conclusions of law:

FINDINGS OF FACT

I.

That Soule Steel Company, the party for whose use and benefit this action is brought is, and at all times herein mentioned has been, a corporation duly organized and existing under and by virtue of the laws of the State of California and having its principal office and place of business in the City and County of San Francisco, State of California.

II.

That Union Paving Co. is, and at all times herein mentioned has been, a corporation duly organized and existing under and by virtue of the laws of the State of Nevada and engaged, and authorized to engage, in business in the State of California and having its principal office and place of business within the State of California, in the City and County of San Francisco.

III.

That Pacific Indemnity Company is, and at all times herein mentioned has been, a corporation duly organized and existing under and by virtue of the

laws of the State of California and doing, and authorized to do, a surety business in the State of California.

IV.

That Maryland Casualty Company is, and at all times herein mentioned has been, a corporation duly organized and existing under and by virtue of the laws of the State of Maryland, and doing, and authorized to do, a surety business in the State of California, and having its principal office and place of business within the State of California, in the City and County of San Francisco. [38]

V.

That heretofore, to-wit, on or about November 4, 1939, defendant Union Paving Co. made and entered into a contract in writing with the United States of America, acting by and through the Bureau of Reclamation, Department of the Interior, for the construction by said Union Paving Co. of public work of the United States, namely, abutments and piers, Pit River Bridge Relocation of Southern Pacific Railroad and U. S. Highway 99, Kennett Division, Central Valley Project, California; that the contract price to be paid for said work under said contract was the sum of \$1,138,288.00; and that said contract was to be performed and executed in the Northern District of California.

VI.

That before said contract was awarded to said Union Paving Co., said corporation furnished to the United States a payment bond, dated November 4,

1939, in which said Union Paving Co., as principal, and said Pacific Indemnity Company and said Maryland Casualty Company, as sureties, are held and firmly bound unto the United States of America in the penal sum of \$455,315.20, for the payment of which sum well and truly to be made, said principal and said *sureties* bound themselves, their heirs, executors, administrators and successors as in said bond specified; that the condition of said bond was that, whereas said Union Paving Co. entered into said contract of November 4, 1939, with The United States of America, now, therefore, if said Union Paving Co. should promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract which might thereafter be made, notice of which modifications to the sureties was expressly waived, then the obligation of the bond should be void but otherwise to remain in full force and virtue; that said bond was intended to protect and did protect [39] said Soule Steel Company, which corporation, as hereinafter specified, supplied labor and materials as subcontractor in the prosecution of the work provided for in said contract of November 4, 1939.

VII.

That subsequent to the execution of said contract and payment bond, that is on or about January 6, 1940, plaintiff entered into a subcontract in writing with the defendant, Union Paving Co., wherein and whereby plaintiff agreed to furnish and supply all

necessary labor, materials, tools, appliances and equipment required for unloading, warehousing, hauling, bending and placing reinforcing bars, and to do all work necessary or incidental thereto, and to furnish all tie wires, clamps, and supporting devices; said reinforcement bars to be placed in accordance with the plans and specifications and the contract of November 4, 1939, between the Union Paving Co. and the United States of America, for a price of \$22.50 per ton for the reinforcing bars so actually placed.

VIII.

That there was erected by the defendant, Union Paving Co., in Abutment No. 1 and Piers 1, 2, 3, 4, 5, 6, and 7, falsework, scaffolding and interior framework which was used by the defendant, Union Paving Co., in pouring and placing the concrete in said abutment and piers; and by the plaintiff in supporting, placing and securing in position the reinforcing bars.

That the defendant, Union Paving Co., contends that under the terms and provisions of said contract of January 6, 1940, that it was the duty and obligation of the plaintiff to erect and to pay the cost of the erection of said falsework, scaffolding and interior framework in said Abutment No. 1, and in said piers above the base thereof. That the plaintiff, on the other hand, contends that under the terms and provisions of [40] said contract that it was the duty and obligation of the said defendant, Union Paving Co., to erect and to pay the cost of the

1939, in which said Union Paving Co., as principal, and said Pacific Indemnity Company and said Maryland Casualty Company, as sureties, are held and firmly bound unto the United States of America in the penal sum of \$455,315.20, for the payment of which sum well and truly to be made, said principal and said *sureties* bound themselves, their heirs, executors, administrators and successors as in said bond specified; that the condition of said bond was that, whereas said Union Paving Co. entered into said contract of November 4, 1939, with The United States of America, now, therefore, if said Union Paving Co. should promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract which might thereafter be made, notice of which modifications to the sureties was expressly waived, then the obligation of the bond should be void but otherwise to remain in full force and virtue; that said bond was intended to protect and did protect [39] said Soule Steel Company, which corporation, as hereinafter specified, supplied labor and materials as subcontractor in the prosecution of the work provided for in said contract of November 4, 1939.

VII.

That subsequent to the execution of said contract and payment bond, that is on or about January 6, 1940, plaintiff entered into a subcontract in writing with the defendant, Union Paving Co., wherein and whereby plaintiff agreed to furnish and supply all

necessary labor, materials, tools, appliances and equipment required for unloading, warehousing, hauling, bending and placing reinforcing bars, and to do all work necessary or incidental thereto, and to furnish all tie wires, clamps, and supporting devices; said reinforcement bars to be placed in accordance with the plans and specifications and the contract of November 4, 1939, between the Union Paving Co. and the United States of America, for a price of \$22.50 per ton for the reinforcing bars so actually placed.

VIII.

That there was erected by the defendant, Union Paving Co., in Abutment No. 1 and Piers 1, 2, 3, 4, 5, 6, and 7, falsework, scaffolding and interior framework which was used by the defendant, Union Paving Co., in pouring and placing the concrete in said abutment and piers; and by the plaintiff in supporting, placing and securing in position the reinforcing bars.

That the defendant, Union Paving Co., contends that under the terms and provisions of said contract of January 6, 1940, that it was the duty and obligation of the plaintiff to erect and to pay the cost of the erection of said falsework, scaffolding and interior framework in said Abutment No. 1, and in said piers above the base thereof. That the plaintiff, on the other hand, contends that under the terms and provisions of [40] said contract that it was the duty and obligation of the said defendant, Union Paving Co., to erect and to pay the cost of the

erection of said falsework, scaffolding and interior framework in said Abutment No. 1 and in said piers.

The Court finds that said contract is uncertain, ambiguous and indefinite in that it does not clearly and certainly appear therein whose duty and obligation it was to so erect and pay the cost of the erection of said falsework, scaffolding and interior framework in said Abutment No. 1 and in said piers.

The Court further finds that in the preliminary negotiations leading up to the making of the contract of January 6, 1940, it was represented by the defendant, Union Paving Co., that it would erect and pay the cost of the erection of the falsework, scaffolding and interior framework, and that the plaintiff could use the same when erected without cost to itself for the purpose of supporting, placing and securing in position the reinforcing bars. That plaintiff, relying on such representations, eliminated from their estimates the cost of a steel structure for such support, placing and securing in position said reinforcing bars, and reduced their estimate from \$28.60 per ton to \$24.80 per ton, and subsequently to \$22.50 per ton, which was the contract price. That on December 29, 1939, it was verbally understood and agreed by and between the parties that said defendant was to erect and to pay the cost of the erection of such falsework, scaffolding and interior framework and that the plaintiff would place, support and secure in position such reinforcing bars for a price of \$22.50 per ton, and should have the right to use the said falsework, scaffolding and in-

terior framework erected by the said defendant free of any charge for such use.

The Court further finds that said defendant, Union Paving Co., prepared the contract of January 6, 1940, and that any ambiguity, uncertainty or indefiniteness which may exist in said [41] contract with respect to whose duty and obligation it was to erect and to pay the cost of the erection of said falsework, scaffolding and interior framework was caused by the said defendant in failing to clearly, certainly and definitely set forth in said written contract of January 6, 1940, the oral understandings theretofore reached by the parties with respect to the erection, payment of cost, and use of said falsework, scaffolding and interior framework.

The Court further finds that the plaintiff at the time of the execution of the agreement of January 6, 1940, understood the following provision contained therein:—

“the subcontractor agrees that it will proceed with the placing of the reinforcement bars in sections of the piers and abutments made ready for such placement immediately after being notified by the contractor of the readiness of each section”

to mean and the Court hereby finds it did mean that said defendant, Union Paving Co., would erect and pay for the cost of the erection of said falsework, scaffolding and interior framework, and that plaintiff would have the right to use the same without cost to support, place and secure the reinforcing

bars. That said defendant, Union Paving Co., at the time plaintiff executed and signed said agreement of January 6, 1940, knew that the plaintiff understood the foregoing provision of the agreement in the manner above set forth.

The Court further finds that the parties have, by their acts, since the execution of said contract of January 6, 1940, construed and interpreted said contract to the effect that said defendant would erect and pay the cost of the erection of said falsework, scaffolding and interior framework, and that the plaintiff would have the right to use the same free of charge for the support and placement of said reinforcing bars, by the following acts: [42]

a) That plaintiff, in accordance with the provisions of the agreement of January 6, 1940, did from March, 1940, to September 30, 1940, render monthly bills for the placement of the reinforcing bars placed during each preceding month at the price provided in said contract, namely, \$22.50 per ton. That said monthly bills were accepted by the said defendant without dispute and were paid up to September 30, 1940, without any objection to the correctness of the same and without any suggestion that said bills were not proper, nor that the full amount of said bills was not due and owing, nor that said bills were subject to any counter-charge.

b) That from January 6, 1940, to October 18, 1940, said defendant erected all of the falsework, scaffolding and interior framework that was required in the construction of said abutment and

piers during said period of time, and purchased and paid for the material and labor needed in the erection of the said abutment and piers, and never suggested nor in any way demanded that plaintiff pay for the same or any portion thereof.

c) That from January 6, 1940, to October 18, 1940, during the progress of the work plaintiff used said falsework, scaffolding and interior framework to support and place said reinforcing bars, and no charge was made by said defendant for the use of the same.

d) That during all of said time, from January 6, 1940, to October 18, 1940, plaintiff had the free use of said falsework, scaffolding and interior framework without any suggestion on the part of the defendant, Union Paving Co., that it was in any way plaintiff's duty or obligation under said contract to pay for or to erect the said falsework, scaffolding and interior framework.

e) That during said period of time from January 6, 1940, to October 18, 1940, said defendant never conferred with plain- [43] tiff in any way as to the type of materials, cost of materials or manner of construction of said falsework, scaffolding and interior framework.

f) That said defendant on or about the 6th day of January, 1940, set up a system of cost keeping, and during all of said period of time, from January 6, 1940 to October 18, 1940, charged the cost of construction of said falsework, scaffolding and interior framework to itself as the cost of pouring concrete,

and did not, in said cost records, charge any of said cost of construction of said falsework, scaffolding and interior framework to plaintiff as a part of the cost of the supporting and placing of the reinforcing bars.

g) That during said period of time said defendant did not on its general books of account make any charge of any kind against the plaintiff for the cost of construction of said falsework, scaffolding and interior framework.

IX.

The Court finds that it was the mutual intention of the parties as it existed at the time of the making of the contract of January 6, 1940, that said defendant, Union Paving Co., should erect and pay the cost of the erection of the falsework, scaffolding and interior framework of Abutment No. 1 and Piers 1, 2, 3, 4, 5, 6, and 7, and that the plaintiff should not erect or pay any of the cost of the erection of said falsework, scaffolding and interior framework, but that plaintiff should have the right without cost to use said falsework, scaffolding and interior framework for the purpose of supporting, placing and securing in position the reinforcing bars.

X.

That on or about October 18, 1940, for the first time, and never before, said defendant, Union Paving Co., made claim to the plaintiff that there was a duty and obligation upon the [44] plaintiff under the terms of said contract of January 6, 1940, to

erect and to pay the cost of the erection of said falsework, scaffolding and interior framework. That at said time, and ever since, plaintiff has denied that it was under any duty or obligation to erect or to pay the cost of the erection of said falsework, scaffolding and interior framework.

XI.

That on September 30, 1940, plaintiff rendered its monthly bill for the reinforcing bars placed in the month of September, 1940, which said bill had not been paid on October 18, 1940, which was the time when the defendant, Union Paving Co., for the first time made claim that it was the duty and obligation of the plaintiff to erect and to pay the cost of the erection of said falsework, scaffolding and interior framework. That subsequently thereto and until the completion of the placing by the plaintiff of said reinforcing bars in accordance with the plans and specifications of the United States of America, to-wit; until July 16th, 1941, plaintiff rendered each month to the defendant, Union Paving Co., monthly bills for the reinforcing bars placed during each particular month. That said defendant, Union Paving Co., refused to pay said monthly bills or any part thereof, except on January 18, 1941, it paid to the said plaintiff the sum of Twenty Thousand Dollars (\$20,000), said defendant retaining and refusing to pay said moneys so billed under the claim that it was the duty and obligation of the plaintiff to erect and to pay the cost of erection of said falsework, scaffolding and interior framework.

XII.

That the United States of America allowed the defendant, the Union Paving Co., credit for placing 11,066,250 pounds, or 5,533.125 tons, of reinforcing steel, and deducted from the sum allowed, the sum of \$102.18 for 4,720 pounds of reinforcing steel [45] furnished but unaccounted for. That there became due to plaintiff from the defendant, Union Paving Co., the sum of \$124,495.31 for placing 5,533.125 tons of reinforcing steel at the price provided for in said contract, namely, \$22.50 a ton, from which there should be deducted the sum of \$102.18 charged by the United States of America as aforesaid, or a total amount due to plaintiff for the placing of said reinforcing steel of \$124,393.13. That plaintiff sold and delivered certain additional services to and for said defendant, Union Paving Co., all of which were necessary for and were actually used in the prosecution of the work provided for in said contract of November 4, 1939, having the reasonable value of \$671.84, and said defendant, Union Paving Co., **promised and agreed to pay the said sum to plaintiff for the same.**

XIII.

That on account of the matters hereinbefore alleged said defendants, and each of them, became indebted to plaintiff in the sum of \$125,064.97; that on or before July 18, 1941, there had been paid or credited on account of said indebtedness the sum of \$47,712.35 and no more; and that on said July 18, 1941, there was due, owing and unpaid from said defendants, and each of them, to plaintiff on account

of the matters hereinbefore alleged, the sum of \$77,352.62.

XIV.

That on or about July 18, 1941, plaintiff demanded from defendants, and each of them, the payment of said sum of \$77,352.62, together with interest thereon at the rate of seven per cent (7%) per annum from said July 18, 1941, to date of payment, but that defendants, and each of them, have failed and refused to pay the same or any part thereof, with the exception of the sum of \$16,000.00 which was paid by defendant, Union Paving Co., on December 31, 1941, and that from and after January 1, 1942, there was due, owing and unpaid from said defendants, and each of them, [46] and there is now due, owing and unpaid from said defendants, and each of them, to plaintiff on account of the matters hereinbefore alleged the sum of \$61,352.62, together with interest on said sum of \$77,352.62 from July 18, 1941, to and including December 31, 1941, at the rate of 7% per annum, and interest on said sum of \$61,352.62 at the rate of 7% per annum from January 1, 1942.

XV.

That the Court finds that the allegations contained in the cross-complaint are not true except the allegations contained in Paragraphs I, II, III, IV, V and VI, pertaining to the corporate organizations of the party litigants to the making of the contract between the United States of America and the defendant, Union Paving Co., to the providing of the payment

bonds by the Pacific Indemnity Company and the Maryland Casualty Company, and to the making of the contract between the defendant, Union Paving Co., and the plaintiff, which allegations the Court finds to be true.

The Court further finds that the allegations, and each and all of them, contained in Paragraph VI of the cross-complaint to the effect that the cross-defendant, Soule Steel Company, did not prosecute the work under said contract diligently and to the completion of the subcontract as provided and that said cross-defendant failed, refused and neglected to do all the work necessary and incident to the placing of said reinforcement bars, and in particular that said cross-defendant, Soule Steel Company, failed, refused and neglected to provide the necessary temporary supports and supporting *devises*, and that the cross-defendant was required to but did not supply the said temporary supports and supporting devices and that the reasonable costs of supporting and providing said temporary supports and supporting devices is the sum of \$58,835.22 are not true, but to the contrary the Court finds that the cross-defendant, Soule Steel Company, did pro-[47] secute the work under said contract diligently and to completion, and did do all the work necessary and incident to the placing of the reinforcing bars, and did provide the necessary temporary supports and supporting devices other than falsework, scaffolding and interior framework with regard to which findings have heretofore been made. The

Court further finds that the Union Paving Co. did not provide or supply any such temporary supports or supporting devices and the Cross-defendant, the Soule Steel Company, is not indebted for the cost of providing and supplying the said temporary supports and supporting devices in the sum of \$58,835.22, or in any other sum, or in any portion of said sum of \$58,835.22, but on the contrary as heretofore found, said Union Paving Co. was, under the terms of the contract, required to provide the falsework, scaffolding and interior framework and to permit the free use of the same.

The Court further finds the allegations found in Paragraph VII, IX, and X of said cross-complaint are, each and all of them, untrue; and that any services claimed to have been rendered by the Union Paving Co. to the plaintiff in the sum of \$1,893.82 or \$385.58 were expended by said Union Paving Co. in the construction and erection of said falsework, scaffolding and interior framework, which, as heretofore found, said Union Paving Co. was under obligation to erect and to permit the free use of it by the plaintiff.

CONCLUSIONS OF LAW

From the foregoing findings of fact, the Court reaches the following conclusions of law:

I.

That under the terms and provisions of the contract of January 6, 1940, between the plaintiff and the defendant, Union Paving Co., it was the duty

and obligation of the Union Paving Co. to erect and to pay the cost of the erection of the falsework, [48] scaffolding and interior framework in Abutment No. 1, and Piers Nos. 1, 2, 3, 4, 5, 6, and 7, and to allow plaintiff the free use of the same when erected for the purpose of placing, supporting and securing in position the reinforcement bars. That the Union Paving Co., has retained and refused to pay to the plaintiff the sum of \$61,352.62, under the claim that it was the duty and obligation of the plaintiff to erect and to pay the cost of the erection of said falsework, scaffolding and interior framework. That said claim is without merit, and said defendant, Union Paving Co., is indebted to the plaintiff in the sum of \$61,352.62, plus interest.

II.

The defendant, Union Paving Co., by its declarations, acts and admissions intentionally and deliberately led the plaintiff to believe that it would erect and pay the cost of erecting the falsework, scaffolding and interior framework of Abutment No. 1, and Piers Nos. 1, 2, 3, 4, 5, 6, and 7, and that the plaintiff would have the right to use the same free of charge for the purpose of placing, supporting and securing in position the reinforcing bars. That the plaintiff believed said representations and so believing acted upon such belief, in that it reduced the charge that it had intended to make for placing, supporting and securing in position the reinforcing bars. That as a result thereof defendant, Union

Paving Co., is now estopped to deny the existence of such declaration, act or admission, or to be permitted to falsify it.

III.

That defendant, Union Paving Co., take nothing by its cross-complaint.

IV.

That defendants, Pacific Indemnity Company and Maryland Casualty Company are legally obligated under the payment bond [49] given by said defendants to make payment to all persons supplying labor and materials in the prosecution of the work provided for in said contract between the United States of America and the defendant, Union Paving Co., if the principal, the Union Paving Co., does not promptly make such payment, and that plaintiff is a person who has supplied labor and materials and as such is entitled to enforce said bond and recover from said bonding companies. That the principal, the Union Paving Co., has not promptly made such payment, and judgment should be entered against said bonding companies.

V.

That plaintiff recover judgment, jointly and severally, against said defendants and each of them, for the sum of \$61,352.62, together with interest on the sum of \$77,352.62, from July 18, 1941, to and including December 31, 1941, at the rate of 7% per annum from January 1, 1942, to date, and for its costs of suit incurred herein.

Let judgment be entered accordingly.

Dated: May 10th, 1943.

MICHAEL J. ROCHE

Judge of the District Court.

(Receipt of Service)

[Endorsed]: Filed May 10, 1943. [50]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 10th day of May, in the year of our Lord one thousand nine hundred and forty-three.

Present: the Honorable Michael J. Roche, D. J.

[Title of Cause.]

No. 22308-R. Civil

ORDER ENTERING JUDGMENT FOR
PLAINTIFFS

This case came on regularly this day for hearing of motion to fix costs. On motion of Courtney Moore, Esq. for plaintiff, it is Ordered that judgment be entered for plaintiff in accordance with the findings of fact and conclusions of law this day filed, with costs taxed at \$299.21. [51]

In the District Court of the United States, in and for the Northern District of California, Southern Division.

No. 22308-R

UNITED STATES OF AMERICA, for use and benefit of SOULE STEEL COMPANY, a corporation,

Plaintiff and
Cross-Defendant,

vs.

UNION PAVING CO., a corporation, PACIFIC INDEMNITY COMPANY, a corporation, and MARYLAND CASUALTY COMPANY, a corporation,

Defendants and
Cross-Complainants.

JUDGMENT

The above-entitled cause coming on regularly for trial before the Honorable Michael J. Roche, on the 8th day of April, 1943, and thereafter submitted on the 19th day of April, 1943, plaintiff appearing by attorneys Messrs. Thelen & Marrin, and Courtney L. Moore, Esq., and defendants appearing by attorney Henry F. Wrigley, Esq., and evidence both oral and documentary having been introduced, the Court thereafter directed judgment as prayed for in the complaint, and denied judgment on the cross-complaint of defendant Union Paving Co., and having

made its written findings of fact and conclusions of law, renders judgment as follows: [52]

It Is Ordered, Adjudged and Decreed that plaintiff do have and recover from defendants, Union Paving Co., a corporation, Pacific Indemnity Company, a corporation, and Maryland Casualty Company, a corporation, the sum of Sixty Nine Thousand Six Hundred and Forty Three and 48/100 Dollars (\$69,643.48), consisting of (a) the sum of Sixty One Thousand Three Hundred Fifty Two and 62/100 Dollars (\$61,352.62) as principal, (b) the sum of Twenty Four Hundred Forty Five and 33/100 Dollars (\$2445.33) as interest on the sum of Seventy Seven Thousand Three Hundred Fifty Two and 62/100 Dollars (\$77,352.62) at the rate of seven per cent per annum from July 18, 1941, to and including December 31, 1941, and (c) the sum of Fifty Eight Hundred Forty Five and 53/100 Dollars (\$5845.53) as interest on the sum of Sixty One Thousand Three Hundred Fifty Two and 62/100 Dollars (\$61,352.62) at the rate of seven per cent per annum from January 1, 1942, to and including May 10, 1943.

II.

It Is Further Ordered, Adjudged and Decreed That plaintiff do have and recover from the defendants, Union Paving Co., a corporation, Pacific Indemnity Company, a corporation, and Maryland Casualty Company, a corporation, the sum of Two Hundred Ninety Nine and 21/100 Dollars (\$299.21), as and for costs and expenses as fixed by the Court.

III.

It Is Further Ordered, Adjudged and Decreed that the defendant, Union Paving Co., take nothing by its cross-complaint.

Dated: May 10th, 1943.

MICHAEL J. ROCHE

Judge of the District Court

(Receipt of Service)

[Endorsed]: Filed May 10, 1943. [53]

[Title of District Court and Cause.]

NOTICE OF MOTION TO FIX COSTS

To the defendants, Union Paving Co., a corporation, Pacific Indemnity Company, a corporation, and to Maryland Casualty Company, a corporation, and to Henry F. Wrigley, their attorney:—

You Will Please Take Notice that the plaintiff in the above-entitled action will move the above-entitled Court on Monday, May 10, 1943, the Honorable Michael J. Roche presiding, for an order fixing and determining costs, and that attached hereto and made a part hereof is the cost bill of plaintiff's expenditures.

Dated: May 4th, 1943

THELEN & MARRIN

COURTNEY L. MOORE

Attorneys for Plaintiff [54]

[Title of District Court and Cause.]

PLAINTIFF'S MEMORANDUM OF COSTS AND DISBURSEMENTS

1942

Sept. 17	Clerk's deposit, filing complaint.....	\$ 10.00
17	U. S. Marshal's fee service of complaint on Union Paving Co. and Maryland Casualty Company	4.20
23	U. S. Marshal's fee (Los Angeles) serv- vice of complaint on Pacific Indem- nity Company	2.06

1943

Apr. 1	Deposition of J. A. Dowling Hart & Hart—reporters—	40.50
	Louis Wiener—Notary Public	15.00
19	Court Reporter's fee, including daily transcript	227.45

TOTAL.....\$299.21
[55]

State of California

City and County of San Francisco—ss

Courtney L. Moore, being first duly sworn, de-
poses and says:

That he is one of the attorneys for the plaintiff in the above-entitled action and as such is better in-
formed as to the above costs and disbursements than
the said plaintiff, and for that reason makes this
affidavit on behalf of plaintiff; that, to the best of
deponent's knowledge and belief, the items in the
above memorandum set forth are correct and that
the disbursements have been necessarily incurred in
said action.

COURTNEY L. MOORE

Subscribed and sworn to before me this 4th day
of May, 1943,

(Seal) ALFRED D. MARTIN

Notary Public in and for the City and County of
San Francisco, State of California.

(Receipt of Service)

[Endorsed]: Filed May 4, 1943. [56]

[Title of District Court and Cause.]

NOTICE OF ASSOCIATION OF ATTORNEY

To the plaintiff above named, and to Messrs. Thelen
& Marrin and Courtney L. Moore, Esq., its at-
torneys:

You, and Each of You, Will Please Take Notice,
that Dion R. Holm, with offices at 206 City Hall,
San Francisco, California, is hereby associated as
attorney of record for defendants in the above en-
titled action with Henry F. Wrigley, Esq.

Dated: May 7th, 1943

UNION PAVING CO.

By J. A. DOWLING

President

I hereby consent to the association of Dion R.
Holm with me as attorney for defendants.

HENRY F. WRIGLEY

Accepted.

DION R. HOLM

Receipt of a copy of the foregoing original is hereby admitted this 12th day of May, 1943.

THELEN & MARRIN

COURTNEY L. MOORE

Attorneys for Plaintiff and
Cross-Defendant.

[Endorsed]: Filed May 18, 1943. [58]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

To the plaintiff and cross-defendant above named,
and to Messrs. Thelen & Marrin and Courtney
L. Moore, Esq., its attorneys:

You, and Each of You, Will Please Take Notice that the defendants and cross-complainants Union Paving Co., Pacific Indemnity Company, and Maryland Casualty Company, intend to and do hereby move the above entitled court to vacate and set aside the decision rendered and the judgment entered in the above entitled action and to grant a new trial of said cause, upon the following grounds:

1. Insufficiency of the evidence to justify the decision and judgment, as the same are contrary to the evidence and to the law applicable to the facts of the case; [59]

2. Errors in law occurring at the trial and excepted to by defendants and cross-complainants;

3. In failing to find that plaintiff and cross-defendant did not:

(a) give notice of rescission of the contract as is required by law;

(b) rescind the contract;

4. In failing to find that plaintiff and cross-defendant proceeded with the work provided for under the contract after it was aware and notified defendants and cross-complainants did not consider the construction of falsework was part of their contract, and accepted benefits in the form of payments after such notice;

5. In the admission of evidence excepted to by defendants and cross-complainants and the rejection of evidence offered by defendants and cross-complainants.

Said motion will be made and based upon the transcript, records, files and minutes of the above court.

Dated: May 17, 1943.

HENRY F. WRIGLEY

DION R. HOLM

Attorneys for Defendants and
Cross-Complainants

Stay of execution is hereby ordered pending determination of motion for new trial to 28 day of May 1943.

MICHAEL J. ROCHE

Judge.

Receipt of a copy of the foregoing original is hereby admitted this 17th day of May, 1943.

THELEN & MARRIN

COURTNEY L. MOORE

Attorneys for Plaintiff and
Cross-Defendant.

[Endorsed]: Filed May 18, 1943. [60]

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

The Motion for New Trial made by the defendants and cross-complaints herein having been heretofore heard and submitted and being now by the Court fully considered, it is by the Court Ordered that said Motion for New Trial be, and the same is hereby Denied.

Dated: July 7, 1943.

MICHAEL J. ROCHE

United States District Judge

[Endorsed]: Filed July 7, 1943. [61]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Union Paving Co., a corporation, Pacific Indemnity Company, a corporation, and Maryland Casualty Company, a corpora-

tion, defendants and cross-complainants above named, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment herein heretofore signed and entered. Said judgment is dated May 10, 1943, and was filed and entered on the same day.

August 6th, 1943.

HENRY F. WRIGLEY

DION R. HOLM

Attorneys for Defendants and
Cross-Complainants

[Endorsed]: Filed Aug. 19, 1943. [71]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL UNDER RULE 75 RULES OF
CIVIL PROCEDURE

To All Concerned:

Please take notice that defendants and cross-complainants Union Paving Co., a corporation, Pacific Indemnity Company, a corporation, and Maryland Casualty Company, a corporation, defendants herein, have filed notice of appeal herein, and, pursuant to Rule 75 Rules of Civil Procedure do hereby designate for inclusion in the record on appeal the com-

plete record and all the proceedings and evidence herein.

San Francisco, California,

August 6th, 1943.

HENRY F. WRIGLEY

DION R. HOLM

Attorneys for Defendants and
Cross-Complainants

(Receipt of Service)

[Endorsed]: Filed August 19, 1943. [72]

District Court of the United States
Northern District of California

**CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL**

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 76 pages, numbered from 1 to 76, inclusive, together with 4 Volumes of Reporter's Transcript and 1 deposition contain a full, true, and correct transcript of the records and proceedings in the case of United States of America, Ex Rel Soule Steel Co., Etc., vs. Union Paving Company, et al., Etc. No. 22308-R., as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Thirty-three dollars and sixty-

five cents (\$33.65) and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 7th day of September A. D. 1943.

(Seal)

C. W. CALBREATH

Clerk

WM. J. CROSBY

Deputy Clerk. [77]

In the Southern Division of the United States District Court, in and for the Northern District of California

No. 22308-R

UNITED STATES OF AMERICA, for use and Benefit of SOULE STEEL COMPANY, a corporation,

Plaintiff,

vs.

UNION PAVING CO., a corporation, PACIFIC INDEMNITY COMPANY, a corporation, and MARYLAND CASUALTY COMPANY, a corporation,

Defendants.

TRANSCRIPT OF TESTIMONY

Thursday, April 8, 1943.

Counsel Appearing:

For Plaintiff:

Courtney L. Moore, Esq.,

For Defendants:

Henry F. Wrigley, Esq.

Before: Hon. Michael J. Roche, Judge.

The Clerk: United States Ex rel Soule Steel Company v. Union Paving Company.

Mr. Moore: Ready.

Mr. Wrigley: Ready.

The Court: Proceed, gentlemen.

Mr. Moore: In this matter, your Honor, I will dispense with an opening statement of what we ex-

pect to prove, because I believe the facts will be very quickly developed. I will call Mr. Soule. [1*]

EDWARD L. SOULE

called as a witness for plaintiff; sworn.

The Clerk: Q. Will you state your name?

A. Edward L. Soule.

Direct Examination

Mr. Moore: Q. Mr. Soule, you are connected with the plaintiff in this case, the Soule Steel Company, are you?

A. Yes, sir, the president.

Q. And you were in 1939? A. Yes, sir.

Q. In what capacity? A. As president.

Q. Are you in charge of their management, too?

A. Yes, sir.

Q. And have been during all that period of time?

A. Yes, sir.

Mr. Moore: Your Honor, in the complaint the plaintiff is the Soule Steel Company, the defendant the Union Paving Company, the Pacific Indemnity Company and the Maryland Casualty Company. Their corporation organization is alleged and is admitted by the answer.

It is alleged that the Union Paving Company entered into a contract with the United States of America, acting through the Bureau of Reclamation, Department of Interior, for the construction

* Page numbering appearing at top of page of original Reporter's Transcript.

(Testimony of Edward L. Soule.)

of the abutments and piers on the Pit River bridge relocation, which is a part of the Shasta Dam project, for the sum of \$1,138,288, I believe it is. That is admitted by the answer.

It is alleged that the Union Paving Company, before said contract was awarded, provided bonds by the Pacific Indemnity and the Maryland Casualty Company for the payment of all bills. That allegation is admitted.

It is alleged that on January 6, 1940 the plaintiff herein, the Soule Steel Company, entered into a subcontract in writing with the defendant Union Paving Company to supply or replace [2] the reinforcing steel on the piers and the abutments. A copy of the contract is attached to the complaint. The execution of that contract is admitted.

It is alleged that between January 6, 1940 and May 31, 1941, 1, that the plaintiff supplied all the labor and materials required to be performed for the sum of \$124,393.13. That is not admitted. It is admitted to this extent, that it is admitted that they performed certain services of the value of, I believe, \$63,280.51.

It is alleged in the nature of an extra on the work that the plaintiff performed additional work there in the sum of \$671.84. That extra is admitted by the answer.

It is alleged that the defendant Union Paving Company, or the defendants became indebted to the Soule Steel Company in the sum of \$125,064.97. That is denied, but it is alleged that \$47,712.35 was

(Testimony of Edward L. Soule.)

paid on that indebtedness, leaving due a sum of \$77,352.62. That is denied.

It is alleged that subsequently, on December 31, 1941, an additional \$16,000 was paid by the Union Paving Company to the Soule Steel Company. That payment is admitted by the answer.

The complaint asks for a judgment for the difference between the \$125,064.97, which is arrived at by the value of erecting the steel, plus the extras, less the payments. The contract provides, your Honor, that the payments shall be at the rate of \$22.50 a ton for the reinforcing steel placed in the piers.

Mr. Soule, did the Soule Steel Company place steel in the piers and abutments on the Pit River Bridge? A. Yes, sir.

Q. About when did they commence the placement of that steel?

A. Sometime early in January of 1940; I think about January [3] 12 or 14th.

Q. By the way, the steel, itself, was furnished by the Government, is that correct?

A. By the United States Government.

Q. And the contract covers the placing of that steel, your Honor. I call your attention, Mr. Soule, to this provision of the contract:

“Payments are to be made to the contractor on or about the 10th of the following month for 85 per cent of the value of the work performed during the preceding month, the remaining 15 per cent to be paid 30 days after

(Testimony of Edward L. Soule.)

the completion of said subcontractor's portion of the work."

I will ask you, as the work proceeded did you render progress billings for the steel placed in the previous months? A. That is correct.

Q. I call your attention, Mr. Soule, to a bill on your letterhead, entitled, "Estimate No. 1," and ask you on or about the date which that bears, which is March 27th, was that bill forwarded to the Union Paving Company? A. Yes, sir, it was.

Mr. Moore: I will ask that that be admitted in evidence and marked with an appropriate number.

The Court: What is its date?

Mr. Moore: I was going to say, it is dated March 27, 1940, Estimate No. 1, for the installation of reinforcing steel as per contract, 19-1/2 tons, \$22.50 a ton, \$438.75; less 15 per cent retention, \$65.81: Balance \$372.94.

(The document in question was marked "Plaintiff's Exhibit 1.")

PLAINTIFF'S EXHIBIT No. 1

ESTIMATE #1

	Unit Price
For the installation of reinforcing steel	
as per contract	
19½ tons 22.50 ton	438.75
Less 15% Retention	65.81
	<hr/>
	\$372.94

[Endorsed]: Filed 4/8/43.

(Testimony of Edward L. Soule.)

Mr. Moore: Q. Now, at the end of the following month, on April 30, 1940, did you render another progress billing for steel placed to the Union Paving Company?

A. Yes, our regular [4] monthly billing, that adds up to this date.

Q. I will ask you one question before I offer it. In giving the number of tons placed, it included the total tons to that date, with a deduction for those previously billed, is that correct?

A. That is correct.

The Court: I did not follow that. Will you read that last question, Mr. Reporter?

(Question read.)

Mr. Moore: We will offer this—and this is for the following month, and is for 115 tons, amounting to \$2587.50, less the 15 per cent retention and less the amount of \$372.94 that had been billed the previous month, leaving \$1826.43.

(The document was marked “Plaintiff’s Exhibit 2.”)

PLAINTIFF’S EXHIBIT No. 2

ESTIMATE #2

	Unit Price
For the installation of reinforcing steel to date, as per contract 115 tons 22.50 ton	\$2587.50
Less 15% Retention	388.13
	<hr/>
Less previously billed	372.94
	<hr/>
	\$1826.43

[Endorsed]: Filed 4/8/43.

(Testimony of Edward L. Soule.)

Mr. Moore: Q. At the end of May, Mr. Soule, you rendered another progress billing for the steel placed up to that date, is that correct?

A. That is correct.

Q. And you followed the same process of billing for the total amount to that date, deducting what had been previously billed?

A. That is correct.

Q. Without repeating the question, the further progress billing in that same process continued?

A. That continued throughout the job.

Mr. Moore: This is for 230 tons up to that date, your Honor.

The Court: You have everything but the date on there.

Mr. Moore: The date is May 31, 1940.

(The document was received in evidence and marked "Plaintiff's Exhibit 3.")

PLAINTIFF'S EXHIBIT No. 3

ESTIMATE #3

	Unit Price
For the installation of reinforcing steel, to date,	
as per contract 230 tons 22.50 ton	5175.00
Less 15% Retention	776.25
	<hr/>
	4398.75
Less previous billing	2199.37
	<hr/>
	\$2199.38

[Endorsed]: Filed 4/8/43.

(Testimony of Edward L. Soule.)

Mr. Moore: Q. On July 1, as of June 29th, a further progress billing was made, which was estimate No. 4, for the steel placed up to that date, is that correct?

A. That is correct; the same [5] procedure followed.

Q. Amounting to 527 tons to that date.

(The document was received in evidence and marked "Plaintiff's Exhibit 4.")

PLAINTIFF'S EXHIBIT No. 4

ESTIMATE #4

	Unit Price
For the installation of reinforcing steel, to date,	
as per contract 527 tons 22.50 ton	11,857.50
Less 15% Retention	1,778.63
	<hr/>
	10,078.87
Less previous billing	4,398.75
	<hr/>
	\$5,680.12

[Endorsed]: Filed 4/8/43.

Mr. Moore: Q. Estimate 5, dated July 29, 1940, covers the steel to that date in the amount of 1027 tons, is that correct? A. That is correct.

Q. And Estimate 6, August 30, covers the steel placed as of that date, of 1445 tons, is that correct?

A. Again that is correct.

(The last two documents referred to were received in evidence and marked, respectively, Plaintiff's Exhibits 5 and 6.)

(Testimony of Edward L. Soule.)

PLAINTIFF'S EXHIBIT No. 5

ESTIMATE #5

For the instalation of reinforcing steel, to date,	
as per contract 1027 T. 22.50 T.	23,107.50
Less 15% Retention	3,466.13
	<hr/>
	19,641.37
Less previous billing	10,078.87
	<hr/>
	\$9,562.50

[Endorsed]: Filed 4/8/43.

PLAINTIFF'S EXHIBIT No. 6

ESTIMATE #6

For the installation of reinforcing steel, to date,	
as per contract 1445 tons 22.50/ton	32,512.50
Less 15% Retention	4,876.88
	<hr/>
	27,635.62
Less previous billing	19,641.37
	<hr/>
	\$ 7,994.25

[Endorsed]: Filed 4/8/43.

Mr. Moore: Q. Estimate No. 7, Mr. Soule, dated September 30, was the billing for the steel up to that time amounting to 2000 tons, is that correct?

A. Yes, sir.

(The document was marked "Plaintiff's Exhibit 7.")

(Testimony of Edward L. Soule.)

PLAINTIFF'S EXHIBIT No. 7

ESTIMATE #7

For the installation of reinforcing steel, to date,		
as per contract	2000 tons	22.50/ton
		45,000.00
Less 15% Retention		6,750.00
		<hr/>
		38,250.00
Less previous billing		27,635.62
		<hr/>
		\$10,614.38

[Endorsed]: Filed 4/8/43.

Mr. Moore: It might simplify things, Mr. Wrigley, if I offered these together and stated what they are. I will offer, your Honor, the following documents as one exhibit:

Estimate 8, dated October 31, 1940, covering the steel placed as of that date, amounting to 2912 tons.

Estimate 9, November 29, covering 3648 tons;

December 31, 1940, Estimate No. 10, 4083 tons;

January 31, 1941, Estimate No. 11, amounting to 4389 tons;

February 28, 1941, Estimate No. 12, for 4683 tons;

March 31, 1941, Estimate No. 13, covering 5056 tons;

Estimate No. 14, dated April 30, 1941, covering 5338½ tons;

Estimate No. 15, dated May 31, 1941, covering 5532.3 tons;

(Testimony of Edward L. Soule.)

Final estimate No. 16, covering the placing of 5533.124 tons, dated June 26, 1941. [6]

Mr. Wrigley: Just to clear one thing, Mr. Moore, those figures that you give there in all cases are the cumulated figures?

Mr. Moore: Those are the cumulated figures, and those progress billings that I referred to were mailed to the Union Paving Company on the dates they bore.

The Witness: That is correct, Mr. Moore.

(The documents referred to were thereupon received in evidence and marked "Plaintiff's Exhibit 8.")

PLAINTIFF'S EXHIBIT No. 8

ESTIMATE #8

For the installation of reinforcing steel, to date,			
as per contract	2912 tons	22.50/ton	65,520.00
Less 15% retention			9,828.00
			<hr/>
			55,692.00
Less previous billing			38,250.00
			<hr/>
			\$17,442.00

ESTIMATE #9

For the installation of reinforcing steel, to date,			
as per contract	3648 tons	22.50 ton	82,080.00
Less 15% retention			12,312.00
			<hr/>
			69,768.00
Less previous biling			55,692.00
			<hr/>
			\$14,076.00

(Testimony of Edward L. Soule.)

ESTIMATE #10

For the installation of reinforcing steel, to date,		
as per contract	4083 tons 22.50 ton	91,867.50
Less 15%		13,780.13
		<hr/>
		78,087.37
Less Previous billing		69,768.00
		<hr/>
		\$ 8,319.37

ESTIMATE #11

For the installation of reinforcing steel, to date		
as per contract	4389 tons 22.50 ton	98,752.50
Less 15% retention		14,812.88
		<hr/>
		83,939.62
Less previous billing		78,087.37
		<hr/>
		\$ 5,852.25

ESTIMATE #12

For the installation of reinforcing steel to date,		
as per contract	4683 tons 22.50 ton	\$105,367.50
Less 15% retention		15,805.13
		<hr/>
		89,562.37
Less previous billing		83,939.62
		<hr/>
		\$ 5,622.75

ESTIMATE #13

For the installation of reinforcing steel to date		
as per contract	5056 tons 22.50 @ ton	113,760.00
Less 15% retention		17,064.00
		<hr/>
		96,696.00
Less previous billing		89,562.37
		<hr/>
		\$ 7,133.63

(Testimony of Edward L. Soule.)

ESTIMATE #14

For the installation of reinforcing steel to date as per contract. 5338½ tons 22.50 ton	\$120,116.25
Less 15% retention	18,017.44
	<hr/>
	\$102,098.81
Less previous billing	96,696.00
	<hr/>
	\$ 5,402.81

ESTIMATE #15

For the installation of reinforcing steel as per contract 5532.3 tons 22.50 ton	124,476.75
Less 15% retention	18,671.51
	<hr/>
	105,805.24
Less prior billing	102,098.81
	<hr/>
	\$ 3,706.43

FINAL ESTIMATE #16

For the installation of reinforcing steel in the Pit River Job as per agreement dated January 6, 1940, as follows:	
5533.124 tons @ \$22.50 per ton	\$124,495.29
Less previous amount billed	105,805.24
	<hr/>
	\$ 18,690.05

[Endorsed]: Filed 4/8/43.

Mr. Moore: Q. Now, did you send on July 16, 1941 a revised final estimate? A. Yes.

Q. And this document is the revised final estimate that was sent on July 16, 1941, is that correct? A. Yes, sir.

(Testimony of Edward L. Soule.)

Mr. Moore: We will offer this as a separate exhibit.

(The document was received in evidence and marked "Plaintiff's Exhibit 9.")

PLAINTIFF'S EXHIBIT No. 9

REVISED FINAL ESTIMATE #16

To revise biling for the installa- / tion of reinforcing steel in the Pit River Job as per agreement dated January 6, 1940 as fol- lows:		
Previously billed	5533.124 tons	
	22.50 T	124,495.29
Should be as per your letter of 7-9-41		
5533.125 tons @	22.50 T	124,495.31
Less steel unaccounted for 4720#		
	102.18	124,393.13
		<hr/>
		\$ 102.16

[Endorsed]: Filed 4/8/43.

Mr. Moore: Q. Referring to those documents, Mr. Soule, the work of placing the reinforcing steel was completed about what date?

A. I don't remember exactly. I think you will have to refresh my mind on some document. May I see that last estimate?

Q. Referring to the final Estimate No. 16, can you tell us?

A. When the work of the Soule Steel Company was completed there, it would be somewhere as of

(Testimony of Edward L. Soule.)

this date, June 26, 1941, or just prior to that time.

Q. Now, Mr. Soule, in the final revised estimate, 16, it states, "Should be as per your letter of July 9, 1941." I will call your attention to a letter dated July 9, 1941, on the letterhead of the Union Paving Company, signed apparently by A. Lawton; is that the letter that you have reference to in the Revised Estimate?

A. That is correct. This stipulates the tonnage which [7] the Bureau of Reclamation allowed the contractor, and which was our controlling final billing amount.

Mr. Moore: I will offer this letter, with the appropriate number.

(The document was received in evidence and marked "Plaintiff's Exhibit 10.")

The Court: I suggest that you read it.

Mr. Moore: I will read it, your Honor. It is addressed to the Soule Steel Company, 1750 Army Street, San Francisco, California, and is dated July 9, 1941:

"Gentlemen:

Re: Piers and Abutments

Pit River Bridge

"We are in receipt of the Bureau of Reclamation's June, 1941 estimate for the above-noted project.

"While the placement of reinforcement steel has been completed, the estimate is semi-final.

"Credit is allowed for the placement of 11,066,250

(Testimony of Edward L. Soule.)

pounds of reinforcement bars and a charge of \$102.-18 for 4,720 pounds of bars unaccounted for.

“You will perhaps recall that the footing in Abutment #3 was raised above the depth shown on the plans which may have resulted in this discrepancy.

“Should you desire to further check these figures or elect to accept the same, we would thank you to advise us of your pleasure and at the same time communicate with us with a view to arranging a meeting to discuss our differences and if possible arrive at an amicable settlement of our account.

“Very truly yours,

UNION PAVING CO.”

Mr. Moore: Q. And your final estimate was received in accord- [8] ance with that figure, is that correct? A. That is correct.

Mr. Moore: I might say, your Honor, that is the figure which is alleged in the complaint reduced to tonnage and multiplied by \$22 .50.

Q. Did you check or have confirmed to you the figure that had been given to you in the letter of July 9, 1941, that has just been read, that is, get a confirmation from the United States Department of Interior as to those figures?

A. We did.

Q. And the letter I hand you——

A. And this letter here is on the letterhead of

(Testimony of Edward L. Soule.)

the Department of the Interior, confirming those exact amounts.

Mr. Moore: We will offer this, your Honor. This is a letter from the United States Department of the Interior, Bureau of Reclamation, addressed to the Soule Steel Company:

“Gentlemen:

“Reference is made to your letters of June 30, and July 10, 1941, requesting advice in regard to payments to the Union Paving Company for placing reinforcing bars under specifications No. 877, Pit River bridge.

“The Union Paving Company has been paid to date \$221,325.00 for placing 11,066,250 pounds of reinforcing bars, and a deduction of \$102.18 has been made from the Company’s account for 4,720 pounds of reinforcing bars furnished to the Company but not used in Government work. The last progress payment was made July 11, 1941, voucher No. 13-3996 (D-634).

“Very truly yours,

“S. O. HARPER,
Chief Engineer.”

(The document in question was received in evidence and marked “Plaintiff’s Exhibit 11.”)

[9]

Mr. Moore: Q After receiving that confirmation from the Government, did you address a communication to the Union Paving Company on or about July 17, 1941?

(Testimony of Edward L. Soule.)

A. This was addressed to them under a registered letter, return receipt demanded, and this is a carbon copy of that letter.

Mr. Moore: We will offer this in lieu of the original, Mr. Wrigley.

Mr. Wrigley: No objection.

(The document was received in evidence and marked "Plaintiff's Exhibit 12.")

PLAINTIFF'S EXHIBIT No. 12

SUBCONTRACT OF JANUARY 6, 1940, BETWEEN UNION PAVING CO. AND SOULE STEEL COMPANY—STATEMENT OF CHARGES OF SOULE STEEL COMPANY AGAINST UNION PAVING CO. AND OF CREDITS ALLOWED BY SOULE STEEL COMPANY AND PAYMENTS MADE TO SOULE STEEL COMPANY.

July 15, 1941.

1. Charges against Union Paving Co.

(a) For the unloading, warehousing, hauling, bending and placing reinforcement bars and clamps, and doing all work necessary or incidental thereto and for furnishing all tie wire, clamps and supporting devices at Pit River Bridge job, as per subcontract of January 6, 1940, between Union Paving Co., as contractor, and Soule Steel Company, as subcontractor:

11,066,250 lbs. of reinforcement	
bars=5,533.125 tons @ \$22.50	
per ton	\$124,495.31
Deduct 4,720 lbs. of reinforcement	
bars furnished but unaccounted	
for	102.18 \$124,393.13

(b) For other work done and materials supplied by Soule Steel Company on said job for the benefit and at the request of Union Paving Co.:

(Testimony of Edward L. Soule.)

“Gentlemen:

“The work which the undersigned contracted to do for you under the above subcontract of January 6, 1940, was completed by the undersigned, in full compliance with all the provisions of said subcontract, on May 30, 1941.

“Enclosed herewith you will find a statement entitled ‘Subcontract of January 6, 1940 Between Union Paving Company and Soule Steel Company—Statement of Charges of Soule Steel Company against Union Paving Company and of Credits allowed by Soule’ Steel Company and payments made to Soule Steel Company—July 15, 1941. As appears from said statement, the sum of \$77,352.62 is now due and payable by you to the undersigned.

“Demand is hereby made upon you for the payment of said sum of \$77,352.62, together with interest thereon [10] at the rate of 7 per cent per annum from July 18, 1941 to date of payment.”

That is the date after the letter.

“Please acknowledge receipt of this letter.

“Yours truly,

“SOULE STEEL COMPANY,

By Edward L. Soule, President;

“Attest”—

Q. Who is this? A. D. C. Stoddard.

Mr. Moore: “D. J. Stoddard, Secretary.”

Attached is the bill—I will merely summarize it, your Honor—charges against the Union Paving

(Testimony of Edward L. Soule.)

Company for 11,066,250 pounds of reinforcement bars, which is the same figure which is in these other letters, equaling 5533.125 tons, at \$22.50 a ton, \$124,495.31; deduct 4720 pounds of reinforcing bars furnished but unaccounted for, \$102.18—that was the one mentioned in the letter—or a balance of \$124,393.13.

(b) For other work done and material supplied by Soule Steel Company on said job for the benefit of and at the request of Union Paving Company—and there are some eight or nine of these items—they aggregate \$671.84, and that is the extra which is alleged in the complaint and which is admitted.

Credits are allowed the Union Paving Company for some dozen items or more amounting to \$1,100.06, and payments in cash amounting to \$46,612.29 or a total credits and payments of \$47,712.35, and the amount now due and unpaid, payable by the Union Paving Company to the Soule Steel Company, is \$77,352.62.

Q. Calling your attention to this letter, Mr. Soule, the cash payments that are noted there on July 27, 1940, of \$5000, [11] August 14, \$12,486.25, September 21, 1940, \$9126.04, on January 18, 1940 of \$20,000—those payments were made by the Union Paving Company to the Soule Steel Company at the time set opposite? A. Yes.

Q. And were received by that company?

A. Yes.

Q. Now, subsequent to the rendition of this bill, Mr. Soule, there was an additional \$16,000 paid on account, is that correct? A. Yes.

(Testimony of Edward L. Soule.)

Mr. Moore: The date of that is set forth in the complaint and admitted in the answer, your Honor, which, deducted from the bill, here, of \$77,352.62, would leave a balance of \$61,352.62.

Q. Has that or any part of it ever been paid?

A. No, sir.

Q. Mr. Soule, did you inquire from the United States Government whether there had been a final settlement between the Government and the Union Paving Company? A. We did.

Q. Did you receive this communication in return to your inquiry?

A. Yes, this is the communication.

Mr. Moore: We will offer this.

(The document was marked "Plaintiff's Exhibit 13" in evidence.)

Mr. Moore: "Dated May 15, 1942.

"To Whom It May Concern:

"It is hereby certified, in accordance with Section 3 of the Act of August 24, 1935, 49 Stat. 793, that final settlement under Contract No. 12r-10788, dated November 4, 1939, between the United States, represented by R. F. Walter, Contracting Officer, and the contractor, Union Paving Company, was made November 3, 1941."

Signed, R. N. Elliott, Assistant Comptroller General of the [12] General of the United States, and it is on the letterhead of the Assistant Comptroller General of the United States, and bears a seal on it. I do not know what the seal is, your Honor, but there is a seal.

(Testimony of Edward L. Soule.)

Q. Mr. Soule, I will hand you a photostatic copy of the agreement between the Soule Steel Company and the Union Paving Company, and direct your attention to certain of the provisions therein. Under the figure "23" it reads as follows:

"The Subcontractor at its own cost agrees to provide all labor, materials, tools, and equipment or other means and promptly unload all reinforcement bars from cars delivered at Redding, California, check and haul the same to the job site and provide suitable warehouse or other means of protection for any material requiring storage or protection, in accordance with the provisions of paragraph 23 of said specifications applicable to the unloading, handling and placement of reinforcing bars."

I might say, your Honor, this numeral 23 refers to the general specifications by the United States Government. When it says, "Paragraph 23," it refers to the Government contract with the Union Paving Company.

"24—Materials to be furnished by the Subcontractor: The Subcontractor at its own cost agrees to provide all labor, wire, wire ties, rods or other materials and appliances used for securing reinforcement bars, metal or other temporary supports, if used, to hold reinforcement bars during the placing of concrete, including backing-up strip required for welding, in accordance with the provisions of paragraph 24 of said specifications.

(Testimony of Edward L. Soule.)

“45—Welding reinforcing bars: The Subcontractor at [13] its own cost agrees to provide all labor, materials and equipment and cut the ends of the bars for welding and provide all clamps, tie rods, cables, blocking, anchors, and other accessories that may be required, including the placement of backing-up strips, and shall firmly and securely hold the reinforcing bars in position while the joints are being welded, in accordance with the provisions of paragraph 45 of said specifications, excepting therefrom only the labor, materials and equipment necessary for the welding of the joints, for which work other contractors will be employed.

“66—Reinforcement bars:

“The Subcontractor at its own cost agrees to provide all labor, materials, tools, accessories and equipment and perform and observe all the provisions contained in paragraph 66 of said specifications.”

Calling your attention, Mr. Soule, to paragraph 66 of the General Specifications, and to the latter part thereof—not the earlier part—to the following provisions:

“Reinforcement bars shall be accurately placed and secured in position so that they will not be displaced during the placing of the concrete, and special care shall be exercised to prevent any disturbance of the reinforcement

(Testimony of Edward L. Soule.)

bars in concrete that has already been placed. Metal chairs, metal hangers, metal spacers, or other metal supports satisfactory to the Contracting Officer, may be furnished and used by the Contractor for supporting reinforcement bars. Wherever necessary, in the opinion of the contractor, to prevent future damage to the concrete or unsightly rust stains on exposed concrete surfaces, [14] all such supports for reinforcement bars shall be made of noncorrodible metal."

Having called those various provisions of the contract to your attention, Mr. Soule, I will ask you what the Soule Steel Company did in the matter of performing or carrying out the requirements of those particular provisions or those provisions of the contract; if you will just state in detail what you did. A. We did all of these things.

Mr. Wrigley: I ask that be stricken out as too general.

Mr. Moore: Yes.

Q. Will you just detail it? Take it in sequence from the beginning of the job.

A. I will take it in sequence as it happened on the job, as I recall.

Q. Yes.

A. We received the bars f.o.b. cars at Redding, California.

The Court: Q. That was your first contact with it, the cars at Redding?

(Testimony of Edward L. Soule.)

A. The contract stipulated that the Government would furnish reinforcing bars according to certain lists f.o.b. cars, Redding, California. We received those reinforcing bars f.o.b. cars, Redding, California, unloaded them, took them to stock piles, made a careful list, and reported the list to the Bureau of Reclamation, and reported it to the Contractor. We sorted and stored the material, cut the material to length, bent it, shaped the ends of the 2-inch bars in accordance with the specifications; we provided whatever storage was required and reported where there was any rusted material, and did the brushing or cleaning, as required by the Engineers.

We next hauled it to the particular pier and abutment sites. We furnished the equipment, the hoisting equipment and other devices that would put it in position, and furnished the labor, the [15] wire, and other accessories to hold it in position and supported it on the falsework built by the Union Paving Company for their work. I think that included all the different things to complete the job. And one other thing: We furnished the clamps and clamped the bars together, each of the vertical bars together that way to be welded. The welding contractor took off the clamps and returned those to us, and then we re-used those on up on the piers.

Mr. Moore: Q. In other words, the Soule Steel Company did not do the welding?

A. We did not do the welding.

(Testimony of Edward L. Soule.)

Q. But you put the clamps on to hold them in position for the welding?

A. That was part of our work.

Q. Were the Government inspectors on the job, Mr. Soule?

A. Yes, sir.

Q. Were they there constantly?

A. They were there constantly.

Q. Was all this work done under their supervision?

A. Yes, sir.

Q. Will you tell his Honor how they function— if they approved of the work, how it was done?

Mr. Wrigley: Pardon me. I think this witness ought to qualify himself in some way, showing he was up there at any particular time, and ever saw what was done.

Mr. Moore: If you raise that—

Mr. Wrigley: Yes.

Mr. Moore: Mr. Stevens is here. He was the superintendent. I will withdraw the question in light of that.

Q. You do know that there were Government Inspectors on the job?

A. Yes, I was on the job. I talked to them in several instances.

Q. You can go ahead and testify if that is the case. You were on the job when the inspectors were there?

A. Yes, sir. [16]

Q. Did you talk to them?

A. Yes, sir.

Q. Will you then explain how the work was carried on—and they supervised the work, did they?

(Testimony of Edward L. Soule.)

A. They interpreted the plans and specifications, and it was their function to declare as to whether or not the work was done in conformance with their plans and specifications.

Q. And if it was not done in that way, what happened?

A. They would say that it had to be remedied, and it was their final action, of course, to pass upon whether it was done according to the plans and specifications, and their requirement was, of course, it would pass to their satisfaction.

Q. After it had passed, then the concrete was poured around these bars, is that correct?

A. That is correct.

Q. But they would not permit the concrete to be poured until the bars——

A. They would not allow the concrete to be poured until the bars were placed in satisfactory position and all details completed according to their interpretation of the plans and specifications.

Q. And, as was shown here, the piers and abutments were all finally completed and accepted by the Government, is that correct?

A. They wouldn't allow the pouring of concrete, and the evidence that it was poured was the acceptance of our portion of the work, because this material was entirely embedded in concrete.

Q. After the welding?

A. Yes, that is correct.

Mr. Moore: That is all.

(Testimony of Edward L. Soule.)

Cross-Examination

Mr. Wrigley: Q. Mr. Soule, starting from the date of the contract in this case between the Union Paving Company and the Soule Steel Company, which was January 6, 1940, how many times [17] were you up to the Pit River job?

A. Three or four times.

Q. Fix those dates, roughly.

A. I went up one time with Mr. Dowling on December—Mr. Moore, I can fix those dates because our telephone operator kept dates of telephone calls for me. I can fix those accurately.

Q. Pardon me for interrupting. I think you misunderstood the question.

A. At one time Mr. Dowling and I, on December 20th and 21st, 1939, went up to the job——

Mr. Wrigley: I ask that that be stricken out as not responsive. I asked this witness to tell me how many times he was up to that job, and fix the dates, after January 6, 1940.

The Court: Very well. We will take a recess and you can check it up.

(Recess.)

Mr. Moore: If your Honor please, Mr. Wrigley has very kindly called my attention to a matter. I handed him two letters that he had not seen, and I neglected to introduce them, so I will offer them at this time. They bear the same date as the demand which was made upon the Union Paving Company for payment, and are practically the same

(Testimony of Edward L. Soule.)

in substance, although they do not have attached to them a copy of the account, but they show demand on the Pacific Indemnity Company, which was one of the sureties, dated July 17, 1941, the letter reading:

“Demand for the payment of said sum of \$77,352.62 has been made by the undersigned upon Union Paving Company, but said company has failed and refused to pay said sum or any part thereof.

“Demand is accordingly herewith made upon you, as one of the sureties in said payment bond, that you pay to the undersigned said sum of \$77,352.62 with interest thereon at [18] the rate of 7 per cent per annum from July 18, 1941 until date of payment.”

(The document was thereupon received in evidence and marked “Plaintiff’s Exhibit 14.”)

Mr. Moore: And an identical letter, dated the same day, July 17, addressed to the Maryland Casualty Company, the other surety.

(The document was thereupon received in evidence and marked “Plaintiff’s Exhibit 15.”)

Mr. Wrigley: Q. Now, just before the recess, Mr. Soule, you were asked how many times after January 6, 1940 were you up to the Pit River job.

A. Four times that I can definitely pin times down on—at the construction of Abutment No. 1 on the south side——

Q. Approximately what date?

(Testimony of Edward L. Soule.)

A. What is that?

Q. Approximately what date?

A. That was approximately in the latter part of February or early March. One time when Mr. Sparling was in charge of the job, when Mr. Stevens was on his vacation; another time later in the fall 1940, Mr. Stevens and I went over principally the north—the construction of the north part of the piers, and when I returned from figuring the Bonneville Dam, I stopped in to the job site.

Q. When you refer to Mr. Stevens, you refer to the man that was up there as superintendent and was a partner with you on that job?

A. That is correct.

Q. Now, going to your first date, which you think was in February or March, when you state that you were at Abutment No. 1——

A. Yes, sir.

Q. Can you give me the date that Soule Steel Company placed the first steel on any abutment or pier on that job?

A. Early in [19] January, and I believe about the middle of the month.

Q. In January—I assume you mean 1940——

A. 1940.

Q. Where did you place any steel?

A. That had to do more with the handling. Some material had come into Redding and had been delivered by the Union Paving Company before we took over the job. We had to take over the han-

(Testimony of Edward L. Soule.)

dling of that steel, because it was incorrectly deposited up at Abutment No. 1.

Q. When was the date that you placed the first steel in place on any pier or abutment?

A. I do not recall.

Q. As a matter of fact, you were not even there at that time, were you?

A. In March, in the latter part of February or March.

Q. When they placed the first steel?

A. No, I wasn't at the pier at the placing of the first steel.

Q. When you were there in February there was no steel placed at any abutment or pier?

A. I was there in the early part of the year when the steel was placed, because I went over, climbed over the pier and saw the steel in place.

Q. At which pier or abutment?

A. Abutment No. 1, south end.

Q. I will go back. Can you fix that date that you say you were there?

A. That has been a year and a half—been a couple of years or so since that happened, and I can't define that definitely without going through some of my correspondence and defining that.

Q. Then you do not know that no steel was placed at any pier or abutment until the latter part of March, 1940; you do not know that fact, do you?

A. Without looking it up in my records.

(Testimony of Edward L. Soule.)

Q. Now, going back to the date of the contract, January 6, 1940, between that date and the first time that you were up there, considerable steel arrived at Redding, didn't it? A. Yes, sir.

Q. The Soule Steel Company did not have anybody there, but [20] Union Paving Company took care of it, didn't they?

A. Two or three hundred tons that was moved in from Redding to the south abutment.

Q. Wasn't all the first steel that came into Redding handled by the Union Paving Company because you had no men or equipment on the job, and that was in January, 1940?

A. You had not given us the contract.

Q. What?

A. That was before the contract.

Q. On January 6, 1940—that is the date of the contract—isn't that the correct date?

A. That is correct.

Q. After January 6, 1940, wasn't there steel delivered at Redding and handled by the Union Paving Company, for which they were duly given credit later?

A. Mr. Stevens would be better qualified to testify on that. We assumed the contract on and after January 6th. We began on the contract after January 6th.

Q. Now, you fix your second visit up there at a time when Sparling was up there. Sparling was the Union Paving Company's man, wasn't he?

A. Mr. Sparling was a partner of Mr. Stevens.

(Testimony of Edward L. Soule.)

Q. He was not Union Paving's man?

A. No.

Q. He was Soule's man up there, I meant to say?

A. He was associated with Mr. Stevens.

Q. What work was going on at that time, which pier or piers?

A. I don't recall just exactly the piers.

Q. Did you go up to the Pit River job, itself, at that time? A. Yes, sir.

Q. Were they working on the north side of the river or the south side, or both sides?

A. They were working on both sides.

Q. Can you tell us if they were working on abutments or on abutments and piers on the south side of the river? [21]

A. They were working on both the abutments and piers on the south side.

Q. And on the north side what were they doing?

A. My memory is a little hazy in connection with that particular time, but it seemed to me like it was away up to the north part. Our notes would show the sequence of that job, and my memory is that it was the north part—the north abutment, and the farthest part north of the job.

Q. Now, you fixed your third trip as being in the fall of 1940. Do you remember what piers they were working on at that time?

A. I have a long sheet, here, giving the numbers, or I could get from the specifications from

(Testimony of Edward L. Soule.)

the numbers, which would give me—I don't just remember those numbers right off-hand.

Q. I will reframe my question. With reference to Pier No. 3, which was the pier right on the river's bank, on the south side of the Pit River——

A. Yes, sir.

Q. Do you have that pier in mind?

A. Yes, sir.

Q. How far had that work progressed at that time on Pier No. 3?

The Court: That is the fall of the year.

Mr. Wrigley: The fall of 1940, yes, your Honor.

A. I climbed up—at the time I was there, I climbed up to about an elevation of, I would say, where these bars, vertical bars came down and these others came up in a slant, because I noted how the clamps were being placed, and Mr. Stevens and I walked all the way around the pier.

Mr. Wrigley: Q. Now, you referred to vertical bars. Were there any vertical bars in Pier No. 3 in place?

A. They were slightly inclined. We called them vertical bars.

Q. They are still sloping, but not as sloping as in the base?

A. The entire pier has a batter on it, but we distinguish between [22] the vertical bars and the flat horizontal bars.

Q. There were a considerable number of piers that had bars that were truly vertical, weren't there, straight up and down?

(Testimony of Edward L. Soule.)

A. Yes, there were some of them that had vertical bars.

Q. Pier No. 3 had no bars that were truly vertical, did it?

A. I think the dowels in the footings were vertical. A quick reference to the plans will show that point.

Q. Now, you fixed your fourth trip as a time when you were returning from another job. Can you be more specific as to the month and year?

A. I remember we went in Bonneville, and I distinctly remember this part. It seemed like we went in at a very hot time of the year, and when we were over there in Bonneville, and when we returned to the City of Spokane it was a very hot time of the year—I think it was in September, as near as I can remember, on account of the heat of the season.

Q. Of 1940? That would be before, then, the one you referred to as being the fall of 1940?

A. No, the other, the first one, was before the return from Bonneville.

Q. You think, then, that would be September of 1940?

A. This is quite a period back, and if it was important that these dates be fixed of a definite time, I could peruse some of our correspondence and find those dates.

Q. I am not so much interested in trying, Mr. Soule, to fix them in point of time, but I am trying to tie them into the progress of the work, what they

(Testimony of Edward L. Soule.)

were doing, and where they were working at the time you were there.

A. I would be glad to go through and determine those dates for you.

Q. No, I am not interested in the dates; I am interested in what you saw there and what they were doing at that time. On your [23] fourth trip, when you say you stopped off en route from the Bonneville Dam job, have you a picture of where the work was going on at that time?

A. Will you repeat that question, please?

(Question read)

A. I think those dates were pretty reasonably close together, as I remember it.

Q. Have you a picture of where they were working at the time that you say you were there the fourth time? A. A picture in my mind?

Q. Yes; irrespective of the date, now, what piers were they working on?

A. The south—coming from the south end down toward the river, work had progressed quite reasonably well on that. Coming up from the north side down on the abutment, the farthestmost abutment on the north side, those were up pretty well, because Mr. Stevens and I discussed some of the placing in connection with that work, and we were up on top of one of the piers, and he was particularly anxious in pointing out to me how well a hoist was working.

Q. Was that one of the northerly smaller piers or one of the larger piers in the river?

(Testimony of Edward L. Soule.)

A. That was the piers away from the river, the smaller piers.

Q. Now, going back to the trip—because we seem to have those two trips, the third and the fourth trips pretty close together—one you say was in the fall of 1940 and the other you thought in September of 1940—how far had the work at that time progressed in pier 2? That is the second one from the river on the south side.

A. I don't exactly recall until I would look over some pictures at that time to find the progress of it.

Q. You do not know whether No. 2, then, was completed or not, as far as your present mental picture is concerned? [24]

A. My memory is that it was not quite completed.

Q. Coming to No. 3, which we divided into two parts, roughly, the base, which had the extreme sloping on the steel from the base on up to the top, where the steel was still sloping, the pier still sloping, but not so much as in the base, how far had the concrete been poured at the time that you were there, either in September or the fall of 1940, on Pier 3?

A. It had been poured, I would judge; there are two slants. There is one slant that comes up, and then the inclination is not so great. It was about up where there was—my memory of it is about the place where that inclination changes.

Q. That is, the concrete was poured about that far. How far was the steel up?

(Testimony of Edward L. Soule.)

A. The steel had to be up about the lapping distance above that, because they were welded, and in my case, looking up from the platform down onto the steel there, I should say 20 or 30 feet, because we were up on the platform and we looked down the distance of the pour of the concrete.

Q. How long were the steel bars that were then being used in Pier No. 3, those two-inch bars?

A. Somewhere around 58 or 60 feet. They varied. I think some of them went to 30 feet, 40 feet, 50 and 60—the usual length that was spliced on there was about 60 feet.

Q. The 60-foot, 2-inch steel bar, such as was used for reinforcing on those piers, weighed how much?

A. I will have to figure this a little bit. 2 times 2, square, four square inches, multiplied by 3.4 is 15.6 pounds per foot. 15 pounds—about 900 pounds a bar.

Q. A two-inch bar, then, if it is 60 feet long, weighs approximately 900 pounds?

A. It weighs 15.6 pounds per foot. Steel weighs 3.4 pounds per each square inch per lineal foot of length. [25]

Q. Now, you have in mind that there were on all those tower piers two rows of 2-inch bars substantially around the outer edge of each pier and a wooden framework built inside toward which those bars leaned?

A. Two and three rows. There are places where there are three rows.

(Testimony of Edward L. Soule.)

Q. Three rows was only down in the base, wasn't it?

A. Reference to the plan would show you where those are, but the three rows go up to quite a considerable distance, and then they start to go down to two rows.

Q. How were those steel bars held in place in the air?

A. They were inclined against the falsework or the supporting means put in position by the Union Paving Company. That was a part of their work that they had to——

Mr. Wrigley: I ask that that be stricken out as not responsive, "as part of their work." The meat of this case is that the Union Paving Company had certain work to do, according to their contention, and the Soule Steel Company agreed to do certain things according to our contention. That is the whole meat of this case. We ask that the conclusion as to whose work it was go out.

The Court: It may go out. That is within the Court's province.

Mr. Wrigley: Q. Can you tell me, with reference to the construction of what we will call the interior wooden work against which the 2-inch bars were leaned, if any of that——

Mr. Moore: Pardon me. There is no evidence that they were leaned against that.

Mr. Wrigley: I thought this witness so testified. Pardon me.

(Testimony of Edward L. Soule.)

Mr. Moore: I didn't understand it that way.

[26]

Mr. Wrigley: Will the reporter go back and read what the witness said, please, as to what the bars were leaned against?

(Record read.)

Mr. Wrigley: That is what I thought he said.

Mr. Moore: He didn't say "leaned"; he said inclined.

Mr. Wrigley: I will use your own word, inclined. Your counsel likes that.

Q. Showing you this picture, I will just ask you to look at it and see if any of that work was going on at any of the time when you were up there.

Mr. Moore: Pardon me. That is Pier 4?

Mr. Wrigley: Yes.

Mr. Moore: You mean similar work going on up there?

Mr. Wrigley: That type of work.

A. I was up there at the time that this type of work was going on.

Mr. Wrigley: Before I examine this witness further, I would ask that this picture be marked for identification for the record.

The Court: It may be marked.

(The photograph was marked "Defendants' Exhibit A for Identification.")

Mr. Moore: Outside of the date, Mr. Stevens, the superintendent on the job, said that is a fair

(Testimony of Edward L. Soule.)

representation. We have no objection to it, your Honor. The date will have to be fixed.

Mr. Wrigley: It is offered primarily, not for being the picture of Pier 4, but the type of work that was used on all that type of pier.

Mr. Moore: There is no objection then.

Mr. Wrigley: Q. Now, showing you again this picture, Mr. Soule, which is a picture of Pier 4, which is the last pier, [27] that, in a general way, depicts the type of structure on all the piers except those that were what we call vertical piers, which had the bars truly vertical. This is a picture of how the piers were built where they were slightly inclined?

A. You are throwing quite a general classification together. Abutments were of one type. There were piers that were solid and there were piers that had cores in them. The larger piers had cores in them. Pier 4 was the one that had the interior cores in them.

Q. Yes.

A. 2, 3, and 4 were of one classification; then there were the other solid piers, and then there were the abutments. So I think you would have to *same* that the form work differed on the different classifications of the piers.

Q. We will ask, first, in a general way, the form work on the abutments was substantially the same, was it not?

A. Abutment No. 1 was different from—that is,

(Testimony of Edward L. Soule.)

the south abutment was different from the north abutment.

Q. In what particular?

A. Abutment No. 1 had an archway where the train went in. The north abutment had no archway, according to my recollection.

Q. But except that the south abutment formed in part a tunnel for the railroad, the general structure as to the steel, the steel reinforcement, the vertical bars, cross bars and that were quite similar?

A. You might call them similar, if that is the type.

Q. Then taking the piers, you would divide those, roughly, into two types also, wouldn't you, those that you would say are more or less truly vertical and had not only vertical steel but had horizontal steel in them, and then piers such as 2, 3, and 4 that were sloping all the way to the top and which had the cores [28] in them?

A. Mr. Wrigley, I think that if you want a detailed description of the piers, reference to the plans should be made. Some of them had some big horizontal beams in them, there—you might call them bracing beams—that in a true description of the different piers we should take them piece by piece to have a true classification of them.

Q. Coming to my question that I was leading to, this depicts in a general way those piers that we would say had the slightly sloping steel in them, and cores, does it not?

(Testimony of Edward L. Soule.)

A. Piers 3 and 4 were similar and they had a base on them; then there was one inclination, and then that inclination became less as they went up. I count piers 3 and 4 very similar.

Q. They are the real deep piers on the river's edge on the south side?

A. Those are the tall piers on the job.

Q. In this picture, these upper numbers, where it is marked "Elevation 903," that illustrates your steel up there at the top, doesn't it?

A. These are what we call the perimeter steel in the piers which lapped at different elevations.

Q. All your steel was perimeter steel on all those jobs, was it not?

A. Not entirely. You had horizontal bars in the base of the piers.

Q. Piers of this type.

A. Then you had your cross walls around the cores, and they had horizontal bars around together with tie bars attached to them.

Q. Referring to your 2-inch reinforcing steel, was that placed in place on these sloping piers except around the perimeter of them?

A. Only around the perimeter.

Q. And that steel, weighing around 900 pounds, each bar would be inclined against wooden falsework?

A. It would be supported against the falsework used in the pouring by the Union Paving for [29] their core.

(Testimony of Edward L. Soule.)

The Court: Q. In what way were they supported?

A. The inclination—when you put a bar, your Honor, that is just off from a horizontal, the weight is very little. What we call in engineering terms a horizontal component, is very small.

Q. In your own way, just tell me how it contacts the wooden framework.

A. The Union Paving Company built a steel rail of 30 or 40 pounds in these verticals coming up, with 10-foot centers in each direction. They welded on a little angle lug to this vertical member, and then they put a ledger attached to each one, and then a framing built of 2-inch plank over the top of that, which the workmen used to run their buggies on, and from which they poured their concrete. On that, of course, there would have to be a certain amount of bracing, because you just can't have a spindle sticking up on that; it has to be cross-braced to take the weight of possibly wind or the action of the concrete buggies as they go over there, and over a big area, of course, that makes quite a stable structure. It is what we call quite a stable framing. So these bars coming up, just against this part, in the inclination up there, hasn't a large amount of horizontal component, as we call it. As soon as the concrete core is up in here, it takes vertically all the stress, because they then become embedded or fixed in that part, so that then that relieves some of the core. The further up that

(Testimony of Edward L. Soule.)

goes, the more embedment, of course, the more the fixedness or security in the concrete.

Mr. Wrigley: Q. Referring back again to a picture of this kind, was it possible to support that steel in place, there, the two rows around the outside of those piers, without inclining it against the wooden falsework inside?

A. Yes, sir. [30]

Q. How?

A. We had two different procedures in mind. Originally, when we figured the job, before the bids were let, we called in the chief engineer of the Pacific Gas & Electric Company, O. W. Peterson, and his assistant engineer, Capacommer. We designed for the first section a triangular piece—your Honor, I am a kind of engineer; I am used to drawing diagrams and so on—but this was a triangular piece with just the inclination that these parts took, and we had a piece coming down in here, and then we had what we called a small frame bent that we rested these against to get started. The minute we got started and the embedment of the concrete came up for a distance, we used what we called a jumbo in each of the diagonal corners.

The Court: Pardon me, Counsel.

(Discussion off the record.)

The Witness: These two jumbos in the diagonal corners had a boom on it, and when the radius came out opposite, they overlapped in the middle. This jumbo over here could be used to raise the other one

(Testimony of Edward L. Soule.)

coming up in certain bars here in the corner. We used these bars to carry our jumbos and to lift the steel up to have it placed in there, because with all these bars sticking up, and they lacked the different elevations, this was the solution and means that was devised by Mr. O. W. Peterson and his assistant engineer.

We also designed, after the bid meeting, to ascertain the comparative costs of the two methods, a complete steel tower all braced similar to what you find in one of these transmission towers. It would in all respects look just like a transmission tower, and then we lean the bars and have them supported on all the different sides.

We calculated the costs of the two methods and had those [31] available for our use.

Q. Were you ever on that job at any time when they were raising the steel on piers 2, 3, or 4 when they were, we will say, a hundred feet up in the air, or 75 feet up in the air?

A. Might I have reference to that plan? These elevations are a little bit confusing—so that I may answer his question most carefully.

Mr. Moore: What plan do you refer to?

The Witness: That white sheet I have, Mr. Moore.

Mr. Moore: The drawing, do you mean?

The Witness: Yes.

The Court: If you want to put it on that board——

(Testimony of Edward L. Soule.)

The Witness: I think I can put it right here for reference, if I may. This plan gives 25-foot intervals in elevation. Now, may I——

Mr. Wrigley: Q. Were you ever on this job at any point where they were placing steel, we will say, 100 feet above what we call the base on 2, 3, or 4?

A. Yes, sir.

Q. Then you saw how the steel was being placed?

A. Yes.

Q. By the Soule Steel Company?

A. Yes, sir.

Q. Is it your testimony that this steel did not lean very heavily against the inside framework?

A. Precisely it leans in comparison with the amount which is off the vertical, and is measured in terms of mechanics as to the weight of the bar in comparison with a component. That bar comes down there. We take a vertical in here, and the amount which represents the component across in here is the amount that it presses in a vertical direction. That is the law of mechanics.

Q. Forgetting the law of mechanics and coming to this job, at a point, we will say, 100 feet above the base, was it possible [32] for you to place the 2-inch reinforcing bars all the way across one side without at the same time placing the bars on the opposite side to counteract that weight?

A. I am going to answer your question in two ways for this reason: It is possible, yes. It is not the practical way to do it. You can make a bracing to place all of the bars at one side, if you so desire,

(Testimony of Edward L. Soule.)

which takes the load in transference through your framed action to the other side. That is done many times.

Q. On this job wasn't it absolutely necessary, not only to counterbrace all the 6 by 6 falsework with 2 by 6's, and, in addition, at the time you placed it on one side, almost immediately to place it on the other side to counterbalance that weight?

A. To what do you refer when you say by 6's?

Q. The 6 by 6 cross pieces that hold the 2 by 2 steel apart?

A. It would be the practical way to do it, Mr. Wrigley.

Q. Isn't that the thing that was done up there all the way? A. Yes, that is correct.

Q. After you left the base, wasn't that done all the way to the top on every one of the so-called sloping piers? A. I take it that it was, yes, sir.

Q. Now, you have stated that the upright rails on 10-foot centers—they were held apart by what you call 6 by 6 crosspieces of wood, weren't they?

A. I wouldn't believe they were 6 by 6's.

Q. Did you see any of them?

A. I should believe they would be about—a ledger wouldn't be in a square shape, because it wouldn't be economical to do it that way. They would be more in a 2 by 10 or 2 by 12.

Q. Did you see any of the interior falsework on any of the piers 2, 3, or 4? A. Yes, I did.

Q. Just, first, a general question before I have

(Testimony of Edward L. Soule.)

it marked [33] for identification. Were you ever on the job and saw any work of that kind going on?

A. I was more interested in our steel part, and I walked over this part, and it had planking on, and I didn't get down to examine that more in particular detail, because I wasn't particularly interested in that part.

Mr. Wrigley: Before I examine further, I ask that this picture be marked next in order for identification.

(The photograph was marked "Defendants' Exhibit B For Identification.")

Mr. Wrigley: Q. Showing you, Mr. Soule, this picture which has been marked Defendants' B For Identification, and pointing out first what we call the girder running from the steel work to the steel work across at various distances in both directions, that was all 6 by 6, wasn't it?

A. I didn't examine it; to my knowledge, I do not positively know.

Q. Now, those 6 by 6's in the two directions were held by braces, 2 by 6 braces, or do you know?

A. From the dimension here to the dimension there, that would look like about a 2 by 6.

Q. Now, tying in from the ends of what I have referred to as 6 by 6's to this wooden bar along the steel work, that is what we call a template——

A. That is correct.

Q. Between the steel bars, there being two rows, you will remember, all the way around, these larger bars, there is what we call a spacer?

(Testimony of Edward L. Soule.)

A. Correct.

The Court: There is one difficulty about it. You are familiar with this matter and I am not, and you are examining this witness.

Mr. Wrigley: I am frank to say that is correct, and I am not only familiar in the sense of studying it, but also seeing it, personally, on the job. [34]

The Court: Since I finally have to determine this matter, it is well to familiarize me with it so that I may follow the testimony.

(Discussion off the record.)

The Court: We will take an adjournment until two o'clock.

(A recess was here taken until 2:00 o'clock p. m.) [34a]

Afternoon Session
2:00 O'Clock P. M.

Mr. Moore: I have this model, your Honor. We might explain it to your Honor if your Honor cares to.

The Court: I don't believe so. Proceed.

EDWARD L. SOULE,
recalled;

Cross-Examination (continued)

Mr. Wrigley: Will the Reporter just read the last couple of questions and answers, please, so I can see just exactly where we left off?

(Record read.)

(Testimony of Edward L. Soule.)

Mr. Wrigley: Q. Now, Mr. Soule, since you were on the stand this morning have you examined your memorandum or diary to verify the dates that you were up there? A. No, I have not.

Q. On any occasion when you were there after January 6, 1940, did you have any conference or conversations with Mr. Dowling at any time on the job?

A. Yes, I had conversations with Mr. Dowling on the job.

Q. Which trip was that after January 6, 1940, that being the date of the contract?

A. I always made a point to look up Mr. Dowling when I was up there on the job to find if he was there. I have no particular refreshment of mind to know more than I would generally ask him how was everything going on the job.

Q. Have you any recollection of ever having seen him on that job after the date of the subcontract?

A. Yes, I think that I saw him at least once that I recall——

Q. Where?

A. ——I remember the blacksmith shop was set up and I remember of having gone by that blacksmith shop and meeting him down at one of the piers. [35]

Q. Was that the second, third, or fourth trip?

A. I couldn't recall, until I would look over the correspondence as to that.

Q. Who was present at the time you met him on the job there? A. What was that question?

(Testimony of Edward L. Soule.)

Q. Who was present besides Mr. Dowling?

A. I was there with Stevens.

Q. You were there with Mr. Stevens at that time?

A. Yes, I was with Earl Stevens.

Q. Who was with Mr. Dowling, if anybody?

A. I have no special recollection until I would refresh my mind by some incident.

Q. Do you know Mr. Hunt, who sits at the end of the table?

A. Yes.

Q. Connected with the Union Paving Company?

A. That is correct.

Q. Did you ever meet him on that job at any time?

A. I saw Mr. Hunt in the office. He had charge of the engineering.

Q. Did you have any special conversation with him, that you remember?

A. We took up with Mr. Hunt relative to an agreement we had about the pouring of the seals in the bottom of the footings, as I recollect, on the job.

Q. The footings or seals of any particular pier, or just generally?

A. No, that was a general item, because we wanted to know about how we were going to hold those bars, and I generally wanted to know how the progress of the piers was contemplated. That would lead us to know what man power to put on the work.

Q. Showing you a carbon copy of what purports to be a letter from Union Paving Company to Soule Steel, do you remember the receipt of the original of that letter?

(Testimony of Edward L. Soule.)

A. I don't particularly remember the receipt of this letter, and it might be that our mail is being opened and this would apply to the accounting department, and it would go direct to those in the accounting [36] department. This was regular standard form on all government work. We supplied payrolls to those in charge of the government, so this would be sort of a routine matter.

Mr. Wrigley: This first letter I would like to ask that it be marked for identification—I will read it—it starts a conversation or correspondence, subject to their verifying that they have the original.

“January 8, 1940

“Soule Steel Company,
1750 Army Street
San Francisco, California.

Re: Pit River Bridge—Piers & Abutments—
Contract No. 12r-10788.

“Gentlemen:

“We enclose herewith a copy of a letter received from the Acting Construction Engineer of the Bureau of Reclamation, U. S. Department of The Interior regarding weekly payrolls and also a sample copy of the affidavit required, in connection with your sub-contract on the above project.

“Kindly arrange to comply with these instructions and if any further information is required please advise.

“Yours very truly,

“UNION PAVING CO.

“By L.”

(Testimony of Edward L. Soule.)

I merely ask that this be marked for identification at this time.

(The document was marked "Defendants' C For Identification.")

Mr. Wrigley: Q. Showing you what appears to be a letter of the Soule Steel Company——

A. I remember this letter.

Q. And that is your signature?

A. That is correct.

Mr. Wrigley: We offer this as our next exhibit in order.

(The document was marked "Defendants' Exhibit D" in evidence.) [37]

Mr. Wrigley: This letter is on the letterhead of Soule Steel Company, addressed to Mr. Joe Dowling, c/o Union Paving Co., Babcock Building, San Francisco, under date of January 8, 1940:

"Dear Joe:

Subject: Pit River Bridge

"Had some conversation with Mr. Woolridge of Columbia Steel Company today and he expressed a desire that you write him a letter stating that you have sublet the installation of the reinforcing steel on the above job to us.

"This will facilitate our relationship with them to the end that we will get the information at the earliest possible time.

"Sincerely yours,

"SOULE STEEL COMPANY,

"By Edw. L. Soule."

(Testimony of Edward L. Soule.)

Q. Showing you what purports to be a letter of January 12, 1940, on the letterhead of the Soule Steel Company, that is your signature at the bottom, isn't it? A. That is correct.

Mr. Wrigley: We offer this as Defendants' Exhibit next in order and ask that it be marked.

(The document was received in evidence and marked "Defendants' Exhibit E.")

Mr. Wrigley: This is a carbon copy of a letter on the letterhead of the Soule Steel Company, dated January 12, 1940:

"Mr. Ralph Lowry,
Construction Engineer
U. S. Department of the Interior
Bureau of Reclamation
Redding, California

Re: Abutments and Piers, Pit River Bridge.

Dear Sir:

"In accordance with the advice given you in Union Paving Company's letter of January 8th, 1940, we have contracted to do the placing of the reinforcing bars in the [38] above mentioned project.

"We are desirous of receiving promptly three copies of the blueprints in the larger scale of all of the piers that you have available at the present time. We also desire three lists of the cutting and placement lists.

"We shall thank you to have these delivered to

(Testimony of Edward L. Soule.)

Mr. Hunt of the Union Paving Company at the job-site or it may be more convenient, if satisfactory to you, that these be sent to us direct.

“Sincerely yours,

“By Edw. L. Soule.”

And a carbon copy of Union Paving Company, San Francisco, which is this copy.

Q. Showing you next, Mr. Soule, what purports to be a carbon copy of a letter dated January 16, 1940, can you identify that as your signature at the bottom?

A. That is a letter which I dictated and sent to them.

Mr. Wrigley: This letter is on the letterhead of the Soule Steel Company:

“Mr. A. J. Guy, Purchasing Agent
Bureau of Reclamation
Redding, California

Re: Abutments and Piers, Pit River Bridge

“Dear Sir:

As you probably know, we have subcontracted for the work for placing the reinforcing steel for the above job from the Union Paving Company. At present we have a list *of the* reinforcing steel which has been purchased from the Columbia Steel applying to this job. May we please request that you send us at the earliest possible time the releases on

(Testimony of Edward L. Soule.)

all of the other material, [39] telling us the number of bars, sizes and lengths, carloads in which the material was shipped, what source, and the weight of the material.

“As we now understand it, some of the material has been shipped by Pacific States Steel Corporation and by Colorado Fuel & Iron Company.

“Will you also give us advance notice when you expect to release any shipments of material. We hope that an arrangement will be so worked out whereby we will, through the Union Paving Company, be able to project our requirements ahead and not have releases come except at a certain time before the material is needed for the construction of the work.

“If you have made any releases for further material other than the reinforcing already at Redding and jobsite, we shall indeed be glad to have you notify us of these releases.

“Sincerely yours,

“SOULE STEEL COMPANY,

“By Edw. L. Soule.”

We offer this as our exhibit next in order.

(The document was received in evidence and marked “Defendants’ Exhibit F.”)

Mr. Wrigley: Q. These letters are, to the best of your belief, correctly dated? A. Yes, sir.

(Testimony of Edward L. Soule.)

Q. Now, Mr. Soule, your counsel has been asked to produce a letter of February 5, 1940, to J. K. Welding Company, and he does not seem to have it *in his* file, and I do not seem to have a copy of it, either, but it may be when I give you the substance of it you may recall such a letter; on February 5, 1940 you wrote a letter to J. K. Welding Company, notifying them, among [40] other things, that a suitable frame was necessary to hold up the steel bars being put in by the Soule Steel Company. Do you remember such a letter?

A. A letter of February 5th addressed to——

Q. J. K. Welding Company.

A. J. K. Welding Company—I do not recall such a letter at the moment. I turned all my files over to Mr. Moore.

Mr. Wrigley: Mr. Moire said he will go through his records and see if he can find it.

Mr. Moore: I might say I looked for it at noon-time and was not able to locate it. I found a letter of March 5th.

Mr. Wrigley: That is another matter.

Q. I am showing you, Mr. Soule, a carbon copy of a letter on my letterhead dated October 28, 1940, addressed Soule Steel Company, signed Union Paving Company by A. Lawton, and down in the lower corner, receipt by, apparently, Mr. Stoddard, of your office. Do you remember that letter?

A. Whether I happened to be out of town on October 28, 1940 I do not know. This is Mr. Stoddard's

(Testimony of Edward L. Soule.)

writing, and that is sufficient evidence that we received the letter.

Mr. Wrigley: We offer this as Defendants' Exhibit next in order, not to prove the facts therein stated, but merely as showing that at that time we were making certain claims and contentions.

Mr. Moore: I am going to object to it for two reasons: No foundation has been laid. It is a letter taken out of the clear. No dispute was going on at that time. I think the letter is a part of the general picture and there has to be a foundation of the circumstances under which it was written.

Also it claims lack of due diligence in the matter, which is [41] not germane to any of the allegations of the complaint and answer. If it is germane to anything, it is to the cross-complaint, and there is no allegation in the cross-complaint that this letter directly pertains to. In other words, Mr. Wrigley is now stepping over into his cross-complaint, your Honor, rather than the complaint and answer. I take it he has to affirmatively prove his cross-complaint, and this letter has to do with that situation, and has nothing to do with either the complaint or answer.

Mr. Wrigley: That is not correct, your Honor. That is not the intention of the offer of proof. This letter is intended as fixing a date and showing at that very time when this letter was written we were having a disagreement over who was responsible for this interior falsework. They were not going ahead

(Testimony of Edward L. Soule.)

because it wasn't their duty to do it. They said the Union Paving Company had to do it, and the Union Paving Company said they had to do it.

Mr. Moore: Just a minute. That is what I objected to. Mr. Wrigley is putting himself in the position of a witness and testifying to the circumstances under which this was written, and that is exactly my point, your Honor. There is no foundation laid for the introduction of this letter at this time. At the proper place there will be no objection made to it; but he is taking a letter not having to do with the time of the contract, a letter written ten months later—eleven months pretty near—October 28, 1940—and offers it when he has not connected it up in any manner, and, as I say, there is no argument that there was a dispute at that time on that point, but that is a matter of their cross-complaint, not in rebuttal to our affirmative case.

The Court: I will sustain the objection at this time. [42]

Mr. Wrigley: Before the Court sustains the objection, I just want to make a statement of my theory on this letter. Their theory is that they earned \$22.50 a ton by doing certain work. Our theory is they did not earn \$22.50 a ton because they did not do the work contracted for, but did a lesser work, and this letter is offered to show that we were complaining at that time that they were not doing certain work that they were required to do.

The Court: I sustain the objection at this time. You may renew our offer at the proper time.

(Testimony of Edward L. Soule.)

Mr. Wrigley: May I ask at this time that this be marked for identification?

The Court: It may be admitted and marked for identification.

(The document was marked "Defendants' Exhibit G For Identification.")

Mr. Wrigley: Mr. Moore, have you a letter dated November 8, 1940, from the Union Paving Company to Soule Steel Company? My copy has a lot of pencil marks no it.

Mr. Moore: Yes, I have seen that. Go ahead and use it. I have it, I know, some place.

Mr. Wrigley: There are a lot of pencil notes that are on this copy that were not on the original.

Mr. Moore: Yes, they were not on there.

Mr. Wrigley: Q. Mr. Soule, showing you a carbon copy of a letter, presumably dated November 8, 1940, addressed to Soule Steel Company, from Union Paving Company, disregarding the pencil notes that are there, was such letter received by the Soule Steel Company—when I say "such letter," I refer to the original of that letter?

A. I believe that this letter was received. It seems to me like I remember it. [43]

Mr. Moore: I am going to make exactly the same objection. It is a letter going along exactly the same lines, and goes to the dispute, your Honor. It is part of the same thing. The situation existed and developed back in October and November. It is part of their counter-claim.

(Testimony of Edward L. Soule.)

Mr. Wrigley: I think the Court ought to know the contents of this letter and know the purpose for which it is offered before it goes on. You are not making any objection that this is not the original?

Mr. Moore: No, I am making no objection on that ground.

Mr. Wrigley: Letter dated November 8, 1940.

“Soule Steel Co.

1750 Army Street

San Francisco, California

“Gentlemen:

“Concerning your various charges for placing reinforcing steel on the Pit River piers and abutments.

“We have many counter claims against your company which we are desirous of adjusting as *soon as* possible and before settling your account. To this end we would appreciate an engagement for a meeting with someone in authority from your company, Mr. Stevens and ourselves.

“Awaiting your pleasure in the matter, we are,

“Yours very truly,

“UNION PAVING CO.

“By J. W. Desmond.”

Now, the purpose of this offer is to prove that in 1940, as of this time, there was a disagreement, and our people were then making counter charges against them for installing this interior falsework.

(Testimony of Edward L. Soule.)

The Court: Counsel admits that, but the objection is the [44] proper foundation has not been laid here, and this has to do with your cross complaint and has to do with the order of proof, and I will sustain the objection on the same grounds that I did the other letter at this time.

Mr. Wrigley: The offer was made on the same theory, namely, that they did not earn \$22.50 because they did not earn \$22.50 a ton.

The Court: You will have an opportunity to make the offer at the proper time.

Mr. Wrigley: We would then ask at this time the letter, without the pencil notes, be marked for identification.

The Court: It may be marked.

(The document was marked "Defendants' Exhibit H For Identification.")

Mr. Wrigley: Q. I am showing you, Mr. Soule, the original of the letter written by me to the Union Paving Company, which has a notation on it, "Carbon copy, Soule Steel Company." Did the Soule Steel Company receive that carbon copy of that letter?

A. This letter stipulates that you talked to Mr. Stoddard and then——

Mr. Wrigley: The question is——

The Court: Just a moment. Keep in mind the question. The reporter will read the question.

(Question read.)

(Testimony of Edward L. Soule.)

A. I think that is a matter of fact in searching our files. I can't answer.

Mr. Moore: I will stipulate that I have a copy of that letter. It was turned over to me either out of Mr. Thelen's or Mr. Soule's file.

Mr. Wrigley: Mr. Thelen had it. [45]

Mr. Moore: Probably Mr. Thelen's file. I know I have read it.

Mr. Wrigley: Q. Mr. Soule, did you read this letter through?

A. Not entirely. I will be glad to do that. (After reading:) What was your question, Mr. Wrigley?

Q. The question was, have you read this letter through? A. Yes.

Q. Did you notice the date on this letter, April 12, 1941? A. Yes, sir.

Q. At that time and prior thereto it is a fact that there was a difference of opinion between the Soule Steel Company, on the one hand, and the Union Paving Company on the other, as to the interior falsework, is that correct?

Mr. Moore: I think the question is improper—difference of opinion. I said there was a dispute. I think it calls for a conclusion. Counsel is attempting to go into their cross-complaint, your Honor, and asking for facts that have nothing to do with this phase of the case.

The Court: He has admitted that there was a dispute at that time.

(Testimony of Edward L. Soule.)

Mr. Wrigley: And that Union Paving Company, throughout this entire period, was contending that the Soule Steel Company was obliged to put in that interior falsework?

Mr. Moore: No, I am not going to make a *staiputation* as to that, because that is a matter of proof.

Mr. Wrigley: No, that they were not contending that.

Mr. Moore: You say this entire period. Your Honor, that would mean making a stipulation going into a great many *ramifacations*. It is a matter of the cross-complaint. I am not going to object to your proving your cross-complaint, but I do [46] object to it at this time because it is an improper order of proof.

Mr. Wrigley: Your Honor, it is not offered on the cross-complaint, at all. It is offered as our defense that they have not yet and never did at any time do the work entitling them to the \$22.50 a ton they are suing for. In other words, it is our answer to their complaint.

The Court: The form of your question is general. You asked was there a misunderstanding, or something, or was there a discussion. Counsel answered it by saying there was a dispute at that time, and that is what you expected to prove, isn't it?

Mr. Wrigley: And to further proof—which he does not want to stipulate to,—that Union Paving Company was contending that Soule Steel Company was supposed to do that work or pay the cost.

(Testimony of Edward L. Soule.)

The Court: He answered that by saying you have to present your proof.

Mr. Wrigley: And that is the question I asked this witness, if that is not the fact.

The Court: That what is the fact?

Mr. Wrigley: That Union Paving Company, at that time—we will say starting with October, 1940 up to the date of these letters—was not contending that Soule Steel Company had to put in that false work or pay for it.

The Court: He answered that by saying it is too general.

Mr. Moore: I answer further, your Honor, by saying the further situation is we have proven by the Government records that this amount of steel was put in. Now, if they have a cross-complaint that they did work that we claim they should have done, [47] that is a matter of cross-complaint and a matter of proving it.

The Court: That is the order of proof, there is no doubt about that.

Mr. Wrigley: It is not offered on our cross-complaint. It is offered on our denial that they have earned \$22.50 a ton. We deny that they earned \$22.50 a ton or that they have done the work.

The Court: Proceed with your proof.

Mr. Wrigley: Q. Mr. Soule, at any time after April 6, 1940 did you, personally, have any discussion with any representative of the Union Paving Company with reference to the interior false work?

A. After April 6th—

(Testimony of Edward L. Soule.)

Q. After January 6th.

A. Oh, January 6th. I thought you said April 6th.

The Court: January 6, 1940.

Mr. Wrigley: Q. When they made the contract.

A. Yes.

Q. With whom did you have a discussion?

A. Mr. Dowling.

Q. Tell us the place where that discussion took place.

A. I was in the East during the time an accident occurred when the Union Paving Company was moving up——

Q. The question was, fix the date.

The Court: Q. Can you fix the date approximately?

A. I think it was November 15, 1940, but that is a matter of definite record, Mr. Moore, at the time the accident occurred and a man was killed.

Mr. Moore: Maybe we can stipulate it was October 15th, wasn't it?

The Witness: October 15th. That was the time the contention began and the Union Paving Company then said we had the obligation of building the interior or the cost of that interior [48] falsework, and it wasn't until that time that that question came up.

Mr. Wrigley: Q. Now, you are speaking for yourself, personally, when you say it did not come up before then, aren't you?

(Testimony of Edward L. Soule.)

A. I had never heard anything about it.

Q. Now, continuously from that time on, isn't it a fact that Union Paving Company claimed that Soule Steel Company, under its *contrart*, was obliged to put in that interior falsework, or pay for it?

A. I believe that was the scheme of things.

Q. And isn't it a fact also that they refused to pay your bills that you billed them, because of their claim against Soule Steel Company for this interior falsework?

Mr. Moore: I think that is an objectionable question, calling for the conclusion of the witness, your Honor.

The Court: Read the question, Mr. Reporter.

Mr. Moore: We will stipulate you would not pay the money.

Mr. Wrigley: Because——

Mr. Moore: The letters and all the rest—there was a dispute going on, and they would not pay the money. They claimed it was Soule's obligation to build the framework, and we will stipulate Soule just as vigorously contended it was their obligation and they held up the money and they haven't paid it yet.

Mr. Wrigley: I think that would be a correct statement, that they billed and claimed they had the money coming, and we claimed they hadn't earned it yet.

The Court: There is no dispute about that. That is the reason we are here.

(Testimony of Edward L. Soule.)

Mr. Wrigley: That is why we are here.

Q. Showing you, Mr. Soule, a carbon copy of a statement gotten [49] up by Union Paving Company, which purports to be their various charges that they make against the Soule Steel Company, have you seen that statement? A. Yes, I have.

Q. Without going into the correctness of the figures, Mr. Soule, and referring now to Pier 1, did Soule Steel Company pay the cost of the labor for installing the interior falsework?

Mr. Moore: I am going to object to that, your Honor, as improper order of proof, coming back to their cross-complaint, attempting to prove as—

Mr. Wrigley: It is not the cross-complaint.

Mr. Moore: It is the cross-complaint.

Mr. Wrigley: It is our answer to your complaint.

Mr. Moore: You do not allege anything in your answer that you can point to that justifies this. You have a cross-complaint for the exact amount you have owing you: \$61,112.62, and this is a bill rendered, and it has to do with the cross-complaint on which they are suing. We agree there was a dispute.

Mr. Wrigley: May it please your Honor, in their complaint they allege that:

“That between January 6, 1940 and May 31, 1941, plaintiff, acting under and in accordance with the terms and provisions of said subcontract of January 6, 1940, furnished and supplied all of said labor, materials, tools and equipment and performed all

(Testimony of Edward L. Soule.)

of said services to and for said Union Paving Co., all of which were necessary for and were actually used in the prosecution of the work provided for in said contract of November 4, 1939, and that Union Paving Co. contracted and agreed to pay to plaintiff for the same the sum of \$124,393.13; that, at the special instance and request of said Union Paving Co. [50] plaintiff sold and delivered certain additional goods, wares and merchandise and performed certain additional services to and for said Union Paving Co., all of which were necessary for and were actually used in the prosecution of the work provided for in said contract of November 4, 1939, having the reasonable value of \$671.84 and that said Union Paving Co. promised and agreed to pay said sum to plaintiff for the same; that on May 31, 1941, plaintiff furnished the last of said labor, materials, tools and equipment and performed the last of said services hereinbefore in this paragraph referred to; and that plaintiff has fully performed all the terms and conditions of said subcontract by it to be performed."

Now, in our answer we admit the extras in the amount of \$671.84. We deny specifically their allegation that they did \$124,393.13 worth of work, and we deny specifically that they fully performed all the terms and conditions of said subcontract. Now, that is our denial to their complaint, and we submit that our evidence is directed solely to that denial, to show that they never performed the work nor paid for the work entitling them to that \$124,000, the issue raised by the complaint.

(Testimony of Edward L. Soule.)

Mr. Moore: Their answer, your Honor, contains a general denial, but they admit that Soule furnished and supplied certain of said labor, materials, tools and equipment. Soule alleges that they supplied all, they admit they supplied certain things. We say the value of that is \$63,000, and then they deny generally the other facts. In the federal practice, under the rules of the District Court, direct and unequivocal answers are required. In the case of *Jones v. Doble Company*, 162 Cal. 497, where the plaintiff sold the defendant certain structural steel, and so [51] forth, in accordance with certain specifications, and alleged in the complaint that they had delivered all of the materials agreed upon, and the answer denied that they had delivered all of the materials agreed upon, the court said:

“This is an insufficient denial and is equivalent to an admission that substantially all were delivered. The omission of a single rivet or bolt would satisfy the denial.”

In *Boscus v. Bohlig*, 173 Cal. 687, which was an action to foreclose a mechanic's lien, the complaint alleged that the plaintiff had duly completed and performed all the terms and conditions of the contract. The defendant denied that he had performed all the conditions of the contract, and the court said at page 690:

“The attempted denial that plaintiffs had duly kept and performed all the terms and conditions of their agreement was utterly insufficient. It amounted to an admission that substantially all of

(Testimony of Edward L. Soule.)

the terms and conditions of the contract had been duly met and executed."

Now, that is the only denial that is in the complaint.

We have alleged in the complaint the contract at \$22.50 a ton. We have proven the total amount of steel. That cannot be controverted and cannot be questioned. They say we should have performed under their interpretation of the contract certain work that they performed; therefore, they are back-charging for it. So they filed a cross-complaint in the action, in which cross-complaint, after quoting from the contracts and the specifications 66, they alleged:

"That Cross-defendant, Soule Steel Company, did not prosecute the work under said subcontract diligently and [52] to completion as in said subcontract provided, and said cross-defendant failed, refused and neglected to do all work necessary and incident to the placing of said reinforcement bars, and in particular Soule Steel Company failed, refused and neglected to provide the necessary temporary supports and supporting devices, and cross-plaintiff was required to and did provide and supply the said temporary supports and supporting devices; and that the reasonable cost of providing and supplying the said temporary supports and supporting devices was the sum of \$58,835.22."

The cross-complaint also contains two other sets of items which have to do with the interpretation of the contract, which, added together, come exactly to the same amount that is in this bill of

(Testimony of Edward L. Soule.)

\$61,112.62, which is the amount of their cross-complaint.

I say, your Honor, that this testimony is not germane in any sense to the complaint and answer. It is germane solely to the cross-complaint, of which they have the burden of proof to prove, that we failed and neglected to do that work and to prove the items, and to attempt to prove it at this time is in no sense rebuttal to the plaintiff's case. It is entirely a matter of the cross-complaint. There is no proper foundation and it is out of order in the matter of proof.

Mr. Wrigley: If it please your Honor, first with reference to the two cases he cites, they go to the old basic rule, the negative pregnant; in other words, we allege that I owe \$100 and I deny I owe \$100. That is an admission that I owe \$99.99. But that is not our answer in this case. We allege they owe \$124,000. We admit they did certain work, and that they earned \$63,000. We deny specifically the balance. There is no negative pregnant there. In other words, a specific [53] denial.

The Court: I was going to ask you if it isn't a matter of order of proof; since both sides will have a full opportunity to present their proof, I think the objection at this time is a good one.

Mr. Wrigley: So the record will be clear and we will not be faced with the situation that we should have offered it on our denial to their complaint, I offer to prove at this time by this witness that as to Piers 1, 2, 3, 4, 5, and 6 and abutment 1, that they never paid for any of the labor used to install

(Testimony of Edward L. Soule.)

the interior falsework. They never paid any of the insurance on that labor. They did not pay for any of the equipment that was used on that installation. They did not pay for any of the lumber that was used. They did not pay for any of the steel that was used. They didn't pay for any of the oxyacetylene welding or the rods used on that interior; that they did not pay for any of the bolts and nuts used in connection with that interior falsework. Keep in mind we are not making any claim for exterior falsework to hold the concrete, this is interior falsework to hold up the steel, and we offer to prove, as shown by our answer, that they did not offer to pay for any of those things.

Mr. Moore: We take the position, as stated before, your Honor, the contract was on the basis of \$22.50 a ton to install so much steel, and that is the amount due us. They claim in the counterclaim we owe them money for work they did for us and therefore that is not a proper defense to our complaint.

The Court: At this time I will sustain the objection. I will let the record also show that you will have a full opportunity to present your proof. It is a matter that has to do with [54] the order of proof.

Mr. Wrigley: Q. Mr. Soule, reading from paragraph 24 of the specifications of the contract between the United States Government and Union Paving Company:

“Materials to be furnished by the contractor—
The contractor will be required to furnish all form

(Testimony of Edward L. Soule.)

materials, including oil for oiling forms; all wire, wire tiles; or other appliances used for holding forms and for securing reinforcement bars; metal or other temporary supports, if used, for reinforcement bars and other metalwork; welding rods for welding reinforcement bars; all backfill materials; all gravel and broken rock or boulders for dry-rock paving; gravel or broken rock for drain pockets; all water used for mixing, cleaning, curing, and cooling concrete and mortar and for moistening backfill materials to be compacted; and also all other materials not a part of the completed construction work required for the completion of the contract. The contractor will be required to haul all of these materials as well as all of the materials delivered to the contractor by the Government. The cost of hauling all of the materials described above and of furnishing all of the materials required to be furnished by the contractor shall be included in the unit prices bid in the schedule for the work for which the materials and hauling are required."

Q. Asking you first, you are familiar in a general way and have seen the specifications and drawings referring to these various piers and abutments on the Pit River job?

A. Yes, I have seen the plans and specifications.

Q. Now, was there any provision made in the drawings or the specifications as to how any of this interior falsework was to [55] be constructed?

A. No, there was no provision.

Q. Speaking specifically with reference to the—they have been referred to as the steel rail up—

(Testimony of Edward L. Soule.)

rights on 10-foot centers—is there any provision for those in the specifications as issued by the Government? A. To my knowledge, no.

Q. Other than as they might have been used by Union Paving Company, or by some other contractor in the finished product, in contracting the finished product? They were not called for, to your knowledge?

A. No, they were not called for.

Q. Did Soule Steel Company furnish the 6 by 6 girders tying those rails into each other, against which the 2-inch reinforcing bars were inclined?

A. We did not furnish them.

Q. Did you furnish the 2 by 6 wooden angular braces that were used to brace the inside falsework?

A. No, sir.

Q. Going back to your former statement, that you did not have the dates, you have a memorandum, have you, that fixes the dates that you were up at the Pit River job, the specific dates?

A. I could search through the file, I think, and fix those dates.

Q. Didn't you keep a dairy memorandum or a diary of your movements?

A. A young lady at the telephone kept track of all my telephones, and in many instances she stated as to where I was.

Q. I would ask that you check those dates for further examination on that question tomorrow, and then your counsel is going to look further for the letter of February 5, 1940 to J. K. Welding Company. That is all.

(Testimony of Edward L. Soule.)

Mr. Moore: I have no further questions.

The Court: Step down.

Mr. Moore: That is the plaintiff's affirmative case, your Honor. [56]

Mr. Wrigley: Does your Honor want to go on now, or shall we take a few minutes' recess?

The Court: We will take a brief recess.

Mr. Wrigley: Mr. Hunt.

LOREN HUNT

called as witness for defendants; sworn.

The Clerk: Q. Will you state your name?

A. Loren Hunt.

Direct Examination

Mr. Wrigley: Q. Mr. Hunt, what is your business or occupation?

A. I am a graduate engineer of the University of California.

Q. Graduate in what year? A. 1932.

Q. Since 1932, when you graduated, you have been following what lines of work?

A. Construction.

Q. Give us principally the various types of construction work that you were on prior to the Pit River job.

A. I was on the Bay Bridge for the State of California; I was connected with the Joint Highway District No. 13, and the construction of the Broadway Low Level Tunnel.

(Testimony of Loren Hunt.)

The Court: It seems to me I heard something about that.

Mr. Moore: I may say, your Honor, I recall having tried a case that lasted over five weeks involving that.

A. And then after that I went to the Bureau of Docks and Yards, Navy.

Mr. Wrigley: Q. At Mare Island?

A. At Mare Island, and the Naval Air Station at Alameda.

Q. What year did you first work for the Union Paving Company? A. 1939. [57]

Q. On what job?

A. I was working in the San Francisco office estimating.

Q. In connection with any particular job?

A. Well, we figured a couple of state jobs, and then succeeded in getting the Pit River Bridge, and then I was connected with that.

Q. You were connected with the Pit River pier jobs beginning when?

A. Well, I went up there in November, 1939.

Q. And you were there until approximately what date?

A. I left in July, 1941, and then I returned in November, 1941 and stayed there approximately two months, and cleaned up and moved out.

Q. What were your duties on the job?

A. I was in charge of the office, timekeepers, cost accountant, and did the purchasing, ordered

(Testimony of Loren Hunt.)

the miscellaneous supplies, and in general acted as office engineer.

Q. Did your duties there also take you out on a job where the piers and abutments were being constructed? A. Yes, sir.

Q. Were you, personally, in contact with the work of construction of the abutments and the various piers?

A. Will you repeat that, please?

(Question read.)

A. Yes.

Q. Every day? A. Yes.

Q. You saw, then, the work that was going on, and who was doing it? A. Yes.

Q. Did you keep all the records on the payroll of the men and what they did?

A. I supervised that, yes.

Q. And the purchase of materials of any kind; did you keep the records of those also, there?

A. Yes, I supervised that work.

Q. When I refer to materials, being specific, the lumber that was used there, and what it was used for? A. That is right. [58]

Q. The so-called iron rails that were used there, and you saw what they were used for?

A. That is right.

Q. And the clamps and the braces—you kept records of that— and the bolts?

A. That is right.

Q. How often were the records of the men's time turned in to you? A. Daily.

(Testimony of Loren Hunt.)

Q. Did you have occasion to check any of those to see if they were correct? In other words, if it was reported I was doing certain work, would you know that, or would you just take somebody else's word for it?

A. Well, you would have to take somebody's word for it, but if you were in doubt you could check.

Q. Did you keep a record of where the different types of material on that job were being used, and what they were being used for? A. Yes.

Q. Showing you, for example, what has been marked as Defendants' Exhibit A For Identification, can you tell us what that depicts, which pier?

A. Pier 4.

Q. Now, looking at this picture, you notice a lot of lumber showing outside, for two purposes: One is staging apparently for the welders, and the other is forms to hold the concrete, and also by looking closely you would identify the inside false-work or form work. Did you keep a record of the lumber that was used inside separate from the record of what was used outside?

A. I would like to qualify that.

The Court: Answer in your own way.

A. Yes, I kept track of the material that went inside the pier and outside.

Q. As a matter of fact, the lumber and timbers that were used inside were an entirely different size of lumber and timber than were used outside, weren't they?

(Testimony of Loren Hunt.)

Mr. Wrigley: Q. Now, from what is referred to as the daily time sheets, this would be transposed to what?

A. A daily summary that summarizes the operation.

Q. And your daily summary——

Mr. Moore: Might we have those marked in some way, they now having been identified?

Mr. Wrigley: I think that would be well to have them marked. I wasn't going to introduce the whole book in evidence, because they are just illustrative.

The Court: Use as much as you want to identify them for the purpose of the record, the daily reports, whatever they are.

The Witness: Those are the daily time sheets.

[61]

Mr. Wrigley: Q. Covering what period of time?

A. Covering the period of time from 9/4/40 to May 20, 1941.

Q. And from these daily time sheets what name did you have to give to these? What did you call these? A. Those are the pick-up sheets.

Q. Those you called your pick-up sheets?

A. Yes.

Q. And from these they would be transposed then to these larger sheets, which are called what?

A. These are the daily summaries.

Q. Now, referring to the daily summaries, who made those up?

(Testimony of Loren Hunt.)

A. Made up by the head timekeeper.

Q. Was he working in your place under your direction? A. He was.

Q. In other words, this is all made up on the job at Pit River and brought into the San Francisco office?

A. That is right, they were sent in daily to the San Francisco office.

Q. Those daily summaries, do they show the type of work, or the place the various men were working?

A. They show the type of work and also the place.

Q. Now, the statement that you made up was made up from records such as this which you summarized into the statement of what you claim was the charge?

A. That is right. They are made up from accumulated records.

Q. Now, these records of your charges for the item of labor, are they all made up in the same way from that same type of daily summaries and daily time cards? A. That is right.

Q. How were the insurance items determined?

A. The insurance item was determined on a rate sent to us by our San Francisco office.

Q. Based upon that same identical payroll?

A. That is right.

Q. How were the records of the equipment kept on that job? Were [62] they kept on these records, or on something else?

(Testimony of Loren Hunt.)

A. They were kept on these records.

Mr. Moore: Pardon me. What do you mean by "these records"?

Mr. Wrigley: I was going to see.

Q. When you refer to these records, Mr. Hunt, do you refer to these so-called smaller sheets, or do you refer to the larger daily summaries?

A. On the pick-up sheets which you have in your hand, that shows the hours which the equipment works, and on the daily summaries it also shows the hours, but it shows our approximate cost of that equipment, operating cost.

Q. In making up this statement——

Mr. Moore: Pardon me for interrupting——

Mr. Wrigley: Surely.

Mr. Moore: I do not know whether I have my notes right. Do I understand the material appears on these sheets, or the use of equipment?

Mr. Wrigley: Labor and equipment. That is as far as I have asked him on those sheets.

Mr. Moore: I understand you to ask him with regard to material

Mr. Wrigley: Not yet.

The Court: Pardon me. Suppose you introduce those and mark them for the record, so that you can disclose what they are.

Q. Those are the daily sheets, are they?

A. Those are the daily sheets, yes.

The Court: He gave the date of the first one and the last. Mark them for the purpose of the record,

(Testimony of Loren Hunt.)

so that when you refer to them hereafter you will know what is referred to.

Mr. Wrigley: I think it would be well to mark them so we [63] can refer to them specifically.

The Clerk: For identification?

Mr. Wrigley: I would say for identification was sufficient.

(The documents in question were marked
"Defendants' Exhibit I For Identification.")

Mr. Wrigley: We would ask that this daily summary for identification be also marked.

(The documents in question were marked
"Defendants' Exhibit J For Identification.")

Mr. Wrigley: Q. Now, were daily sheets and daily summaries kept throughout the entire job at Pit River?

A. They were kept entirely at the Pit River.

Q. I say, were they kept throughout the entire period? A. Yes,

Q. These particular daily summaries do not cover all of them, just showing how you kept the records?

A. That is right; they are samples.

Q. How did you keep records with reference to the steel that was used there?

A. In what regard?

Q. For example, without going into the correctness of these accounts, you make certain charges against Soule Steel Company for certain steel used

(Testimony of Loren Hunt.)

in certain piers. Where is the record, what type of record was kept of that steel?

A. The railroad steel was purchased for that entire purpose, with the exception of the rails that we had to run our cars on, which is very minute.

Q. The rails to run your cars on was an entirely different sized rail, weren't they?

A. No, they were not.

Q. The same size?

A. The same size. They were a 40-pound rail.

Q. What other type of steel was purchased for use in that interior falsework?

A. We purchased some angle iron, which we cut up into clips to weld onto the railroad rails, and also in a number of [64] cases we purchased angle iron that was used in place of rail.

Q. You mean as uprights?

A. As uprights.

Q. Now, were there any other types or kinds of steel purchased and used for the interior falsework?

A. That covers it, with the exception of bolts and nuts and miscellaneous.

Q. What would bolts and nuts be used for?

A. The 6 by 6's were bolted onto these angle plates. The braces were bolted onto these rails.

Q. How was the record of the oxyacetylene welding and the rods kept, as used on the interior falsework?

(Testimony of Loren Hunt.)

A. The majority of the oxyacetylene was charged directly to the shop and then it was charged out as it was taken from the shop.

Q. How was the record kept on that? Who kept it?

A. The accountant. When the material was purchased we purchased it for a certain item of work, and when the invoice would come in we would note on this invoice where this material was going, and the accountant would keep track, accumulate it.

Q. Now, were any of the records there not kept under your direction for any of the materials or labor for the interior falsework?

A. I know of none.

Q. And the statement in question of these charges was made up by you, personally, from those original records?

A. From the summaries.

Q. From the summaries? A. Yes.

Q. Have you checked this carbon copy that I am holding to know whether that is a correct copy of your original summary that was furnished to Soule Steel Company?

Mr. Moore: Just a minute. That is a little broad question, a duplex question.

Mr. Wrigley: I will agree with you. I will agree with the [65] last part.

Mr. Moore: I think also it should have some dates attached to it.

(Testimony of Loren Hunt.)

Mr. Wrigley: I think the question has several objections. Would the reporter read it?

(Question read.)

Mr. Wrigley: I would ask that the whole question be withdrawn.

Q. Have you checked this summary and know that it is a correct summary as made up by you of the charges for the interior falsework?

Mr. Moore: I am going to object. That calls for a conclusion. You say a correct summary. We question its correctness.

Mr. Wrigley: If that is your objection—that this is a correct copy of the summary that he made——

Mr. Moore: There is no objection to that.

Mr. Wrigley: That is the intent of this question.

Mr. Moore: I have no objection to that.

Mr. Wrigley: Because this is a carbon of it.

Mr. Moore: I have no objection to it.

Mr. Wrigley: For the present I would ask merely that this be marked as next in order for identification.

(The document was thereupon marked “Defendants’ Exhibit K For Identification.”)

Mr. Wrigley: Q. I am showing you, Mr. Hunt, what has been marked “Defendants’ Exhibit B For Identification.” I will ask you to examine that picture. Referring first to the so-called cross pieces, what size were they?

(Testimony of Loren Hunt.)

A. The horizontal members were 6 by 6's. [66]

Q. And the braces were what size?

A. 2 by 6.

Q. And the templates were what size?

A. Usually 3 by 4.

Q. And the so-called spacers, holding the bars apart.

A. 3 by 4.

Q. Now, in making up your summary or statement of the cost of the interior falsework, did you charge this entire cost of all the inside lumber?

A. All the inside lumber was charged to that account.

Q. A hundred per cent?

A. A hundred per cent.

Q. Now, referring to the upright rails, which the previous testimony shows was 10-foot——

A. 12 feet would be closer. 12 feet was the maximum spacing we permitted, and they varied to 10, so 10 is all right.

Q. What percentage of the cost of those rails is included in this so-called summary of yours?

A. 100 per cent.

Q. Now, the clips that were welded to those rails to hold the cross members, how were they charged?

A. They were charged 100 per cent.

Q. Now, you have a small item in there of nails. Where were the nails used?

A. Nailing the 2 by 6 braces to the 6 by 6 horizontal members.

Q. The nails, in other words, were spikes?

(Testimony of Loren Hunt.)

A. 30 penny nails.

Q. Now, the bolts that you have charged——

Mr. Moore: I don't want to interrupt. Did you ask him how the nails were charged, or did you overlook it?

Mr. Wrigley: What percentage?

Mr. Moore: Yes.

Mr. Wrigley: I will clear it up. It was clear to me; maybe it wasn't clear to you.

Q. Now, the nails, what percentage of the nails used to hold these [67] angular braces inside was charged to inside falsework?

A. All the nails used were charged 100 per cent. to this account.

Q. You mean all the nails used inside?

A. Inside.

Mr. Moore: May I interrupt a moment?

Mr. Wrigley: Surely.

Mr. Moore: When you say "this account," do you mean they were charged on this account to Soule? Is that the intent?

Mr. Wrigley: That is the intent of my question.

Mr. Moore: O.K.

Mr. Wrigley: Q. Now, the bolts that were used inside to bolt the 6 by 6's, how were they charged?

A. They were charged 100 per cent.

Q. To Soule. Now, did the charge for any of the interior falsework items include the cost of any of the exterior forms or scaffolding used?

A. Will you have that repeated, please?

(Testimony of Loren Hunt.)

(Question read.)

A. No.

Q. Did the charge summarized by you for interior falsework include any of the cost of building the—we call it an elevator outside?

A. The tower?

Q. You call it a tower?

A. No, there is no cost.

Q. The exterior stairway that was used to reach any given height, what proportion, if any, of that was charged up to interior falsework?

A. None.

Q. Are you familiar with the specifications of the Government for these various piers?

A. Yes.

Q. Did the specifications, or any of the drawings furnished you by the Engineers, call for any particular size or type or any interior falsework at all?

A. No falsework.

Q. Did the specifications or drawings in any particular require [68] these rails?

A. No.

Q. Calling your attention now to what has been marked as Defendants' Exhibit A For Identification, what you refer to as being the tower is this so-called elevator or lift that is outside the work, entirely?

A. That is right.

Q. And the boom that we see a part of there is what is commonly referred to as the Chicago boom?

A. Yes.

Q. And that is a boom used for what purpose?

(Testimony of Loren Hunt.)

A. It was erected by Soule Steel to lift their steel, reinforcing steel.

Q. Now, referring again to this picture, and particularly to the portions of it where the outside exterior concrete form is, can you tell by looking at that picture whether that is just being placed there to pour the concrete, or whether the concrete has already been poured?

Mr. Moore: What is the place, may I ask?

The Witness: This concrete form.

The Court: Frame for concrete.

A. No, I couldn't say definitely.

Mr. Wrigley: Well, could your concrete at any time be poured at a point above where you had framed for the concrete outside?

A. It couldn't be poured above where we have forms.

Q. Were there any inside concrete forms?

A. On two piers, yes.

Q. Which piers were those?

A. Piers 3 and 4.

Q. When you refer to inside forms, what are they commonly referred to on that job, as what?

A. As cores.

The Court: Q. As what?

A. Cores, hollow sections.

Q. In order to pour the concrete you would have to have that inside form, wouldn't you?

A. That is right.

Q. On piers 3 and 4 only, where there are hollow spaces or cores within the piers, themselves?

(Testimony of Loren Hunt.)

A. That is right. [69]

Q. And that is the only inside form work that was necessary in the pouring of the concrete there?

A. That is all.

Mr. Moore: I object to that question. It calls for the conclusion of the witness, if I understand the question to mean that those are the only things that were necessary in order to pour the concrete in such form.

Mr. Wrigley: That was not my question.

The Court: Read the question, Mr. Reporter.

(Question read.)

Mr. Moore: What inside form work do you mean?

Mr. Wrigley: The cores that he is talking about.

Q. Now, with the exception of Piers 3 and 4, namely, the piers immediately on the north side of the Pit River, was there any interior form work on any of the other piers?

A. No, all the other piers were solid.

Q. What depth of concrete was permitted to be poured on that job at a time?

A. 20 feet was the maximum that was placed.

The Court: Q. What do you mean by that?

A. Height of lift.

Q. That is, when you are pouring your concrete, do you pour the height of 20 feet?

A. We poured the height of 20 feet, I believe, is the maximum we placed it.

The Court: I just wanted to follow the question.

(Testimony of Loren Hunt.)

The Witness: Our average lift was around 12 feet.

Mr. Wrigley: Q. Coming to this particular point, at this particular elevation do you know whether that is correct, there, which is marked 163 feet elevation (indicating)?

A. I couldn't say whether it is correct or not.

Q. At or about that elevation, namely, just as you are leaving the base, what thickness were the concrete lifts or pours?

A. Well, the height of the lift depended upon a number of things. [70] In the first place, it was only 5 feet. That was limited by the specifications.

The Court: Q. Limited by what?

A. Limited by the specifications in the base, but as we got above the base, the height of the lift depended upon the location of the two-inch bars, where they were to be welded. In general, we kept our lifts, lift verticals, to 12 feet.

Q. Tell me, while I think of it, the welding job was not completed before any concrete went in at all; it progressed, did it?

A. It progressed. We led up. The steel had to be placed, and then it was welded, and then the concrete was placed.

Mr. Wrigley: Q. You heard the previous testimony that, generally speaking, this steel was 60 feet long, in two tiers, overlapping in length so that the welds did not come immediately opposite each other in the two tiers; that was correct, wasn't it?

A. That is correct.

(Testimony of Loren Hunt.)

Q. It is also correct, isn't it, that the steel had to be put up and in place before it was welded?

A. That is correct.

Q. And had to be welded before you could pour the concrete? A. That is correct.

Q. Now, generally speaking, how far were the welders ahead of the concrete pouring?

A. Well, we were practically on top of them.

Q. That is——

A. That is, we were waiting for the welders to get out of the way so we could place the concrete.

Q. Would you be starting the bottom as they welded the top, or would you be almost up to them pouring your concrete?

A. No, you would have to come up close to the weld and then wait for them to weld.

Q. The steel would then be placed above that, or 60 feet higher, [71] would it not?

A. That is right.

Q. How many lengths of steel were commonly ahead of the pouring of the concrete?

A. Not more than one length.

Q. Well, you are working on one, pouring the concrete, and they would be how much above that?

A. 60 feet would be the maximum.

Q. How about the overlap?

Mr. Moore: Q. As I understand, if I am right, they come up practically to where they were welding, and then the additional rods were lower down, is that correct? A. That is——

Q. And then you proceeded on.

(Testimony of Loren Hunt.)

Mr. Wrigley: Q. Looking again at this picture, how far would you say it is from the tops of those rods down to where the top of the concrete form is?

A. Very close to 60 feet, maybe 65.

Q. If that were only 65 feet, what would the length of those rods be?

A. Those rods would possibly be 60 feet.

Q. To what extent do those rods overlap each other?

A. Those rods are butt-welded.

Q. No, I refer to the two piers, one inside and one outside.

A. The piers were approximately 5 to 6 feet apart. It varied.

Q. The two sets of welds would be five to six feet apart only?

A. Yes.

Q. Now, were you, under the specifications, permitted to pour concrete all the way from the top of the staging down to where you were pouring it down here?

A. There is nothing in the specifications that limits, that specifically limits the height of the flow of the concrete.

Q. Were you permitted at all to pour any concrete in a chute on that job?

A. Not permitted to chute concrete. You must drop it vertically in a vertical enclosed pipe. [72]

Mr. Moore: I do not like to interrupt, Mr. Wrigley; are you referring to the provisions of the specifications, or what the inspectors required?

Mr. Wrigley: I am referring to the specifica-

(Testimony of Loren Hunt.)

tions, themselves. They are quite specific in that. The specifications in this case detail the pouring of the concrete, didn't they?

The Witness: I don't understand your question, when you say "detail."

Mr. Wrigley: Q. Well, they told you how it was to be mixed, didn't they? A. That is right.

Q. And they told you the different depths of the various concrete lifts; wasn't that specified in the specifications?

A. The height of the lift was specified in the footings as 5 foot.

Q. And it was specified also that you could not pour it or chute it to the place——

A. You couldn't chute concrete.

Q. That was in the specification?

A. That is right.

Q. Referring again to Defendants' Exhibit B, and noticing that the elevation is shown there to be 923 feet, that point in the air, was any portion of that staging at that time used by Union Paving Company for pouring concrete?

A. No, not at that time.

Mr. Moore: You are talking about the top layer, are you?

Mr. Wrigley: No, the top layer on this particular picture at this particular time.

Q. At the time that this picture was taken, Union Paving Company was working lower down pouring?

Mr. Moore: If he knows.

(Testimony of Loren Hunt.)

Mr. Wrigley: Q. Do you know where the Union Paving Company was working at the time this picture was taken? [73]

Mr. Moore: I would like to ask this question:

Q. Were you present when the picture was taken?

A. I don't believe I was up there at the time, no.

Mr. Wrigley: Q. Is that a correct picture depicting what was there at that elevation of 923 feet?

A. I believe so, yes.

Q. As a matter of fact, that is typical of all elevations in all of the piers of that type, isn't it?

A. That is right.

Q. They were all built of 6 by 6 horizontals, using 2 by 6 braces, held up by rails, and so on. I ask you to examine this whole set of pictures, six in number, and tell me what they depict; in other words, which abutments appear.

A. Abutment 1.

Q. Those are all various stages of abutment No. 1. Abutment No. 1—this question may be leading; I think it is covered, however—was the first abutment on the south side of the river that constituted not only the tunnel where the S. P. came out, but also for the roadway of the State highway?

A. It was the abutment to the State highway, yes, and it was the tunnel section of the railroad.

Q. In other words, this bridge, as finished, is used by the railroad and also as the highway crossing from one mountain to the other at a high level?

(Testimony of Loren Hunt.)

A. Yes.

Mr. Moore: I suggest it is a two-decker bridge, I believe, isn't it?

Mr. Wrigley: I think that is a technical description of it.

The Witness: Double deck.

Mr. Wrigley: Does your Honor want to recess now? I noticed myself it is after four o'clock.

The Court: Very well, we will take an adjournment until tomorrow morning at 10:00 o'clock.

(Adjournment taken until tomorrow, Friday, April 9, 1943, at 10:00 o'clock a. m.)

[Endorsed]: Filed April 9, 1943. [74].

Friday, April 9, 1943
10:00 O'Clock A. M.

The Clerk: Soule Steel v. Union Paving Company.

The Court: Proceed, gentlemen.

LOREN HUNT

Recalled;

Direct Examination (Continued).

Mr. Wrigley: Q. Mr. Hunt, when we adjourned yesterday you were shown this bunch of pictures,

(Testimony of Loren Hunt.)

and you stated they were a series of pictures in the various stages of development on Abutment No. 1?

A. That is right.

Mr. Wrigley: There is a group, here, that I would ask be marked as one exhibit, but with separate identification. What is the next number?

The Clerk: L. For identification?

Mr. Wrigley: Yes, for identification at this time.

(The photographs in question were thereupon marked L-1, L-2, L-3, L-4 and L-5 for Identification.)

Mr. Wrigley: Q. Before showing you those pictures again, Mr. Hunt, how many so-called abutments were there on this Pit River project?

A. There were four abutments.

Q. How many piers were there?

A. Ten piers.

Q. In addition to the four abutments?

A. That is right.

Q. As to Abutment No. 1, was it similar to the other three abutments?

A. No, it was entirely different.

Q. In other words, that one abutment at the south side was the abutment that also constituted the tunnel for the railroad out of the mountain, and also for the highway crossing, and coming out?

A. That is right.

Mr. Wrigley: Mr. Moore, this question may be leading and [75] you may object to it on that ground.

(Testimony of Loren Hunt.)

Q. Your charges that you have made against the Soule Steel Company affect only abutment No. 1, and not abutment No. 2, 3 and 4?

A. That is right.

Q. State, generally, the differences between Abutment No. 1 and the other three abutments, with a view of explaining the reason why there was not a charge made against Soule in connection with Abutments 2, 3 and 4.

Mr. Moore: The question is complex and also that part which calls for a conclusion is objectionable.

Mr. Wrigley: Will the reporter read the question?

(Question read.)

The Court: Is 1 the double-decker?

Mr. Wrigley: The double-decker abutment, and there are other features also.

The Court: Develop the facts.

Mr. Moore: My objection does not go to the point, your Honor, distinguishing between the two sets of abutments; it is the reason why he made the charges against the one and not the other. I think that part is asking for his conclusion, and therefore should be rephrased when you come to it, Mr. Wrigley.

Mr. Wrigley: Q. Showing you, Mr. Hunt, the picture that has been marked L-4 for Identification, that is the picture of Abutment No. 1 taken at what stage?

(Testimony of Loren Hunt.)

A. Placing the lining of the tunnel section, these rib forms, or bracing for the forms.

Q. Did you have anything like that on any of the other abutments? A. No.

Q. Showing you next the picture that has been marked L-5 for Identification, that was taken at what stage of the work? [76]

A. That was taken after the reinforcing steel was placed over the arch, but not over the mass section.

Mr. Moore: Pardon me, just a moment. Don't you think you ought to explain the difference between the arch and the mass section?

Mr. Wrigley: Q. Do you understand, Mr. Hunt?

A. I understand that question. On the left——

Mr. Moore: Pardon me, just a moment.

Mr. Wrigley: Q. Do you refer to the left of that picture?

A. On the left of that picture——

Mr. Moore: Mr. Wrigley, just a moment. I have a large sized drawing of that.

Mr. Wrigley: Of that?

Mr. Moore: A fairly large sized drawing, (producing a drawing).

Mr. Wrigley: Mr. Moore, is there any objection to my asking the Clerk at this time to mark this for identification?

Mr. Moore: Not in the slightest. I think it ought to be.

(Testimony of Loren Hunt.)

(The drawing was marked "Defendants' Exhibit M For Identification.")

Mr. Wrigley: Q. Mr. Hunt, leaving momentarily the pictures and looking at this drawing which has been marked M-1 For Identification, is that a correct draftsman's drawing illustrating the work on Abutment No. 1? A. Yes.

Mr. Moore: That is the Government's drawing. It is an enlargement of the plans and specifications.

Mr. Wrigley: Q. And this drawing is the drawing to which the work was performed?

A. Yes.

Q. Now, Mr. Moore asked that you more clearly point out the portion that is called the mass portion.

A. This portion in [77] here (indicating).

Q. Does that drawing also show the location of the reinforcing steel that was placed in that abutment by Soule Steel Company?

A. It does, a portion of it.

Q. A portion of it?

A. There are three or four prints of that.

Q. Four different prints? A. Yes.

The Court: Q. What do you mean by that?

A. Well, this is one print in connection with the——

Q. Oh, I see, yes.

A. These are just sections.

Mr. Wrigley: Q. So that drawing and the mass portion illustrates what you had reference to when you referred to the mass portion of this abutment?

(Testimony of Loren Hunt.)

A. That is right.

Q Did the other abutments have *you* similar mass portions and tunnel portions as abutment No. 1 did? A. No.

Q. Referring back now, Mr. Hunt, to the picture marked for identification M-5, can you point out in that picture the items for which Union Paving Company made a charge against Soule Steel Company?

A. Only a portion of the items.

Q. Point out what piers they are.

A. These rails, the steel coming up through—this rail, *this rail*, and this structural steel, second-hand structural steel we purchased to support that steel.

Mr. Moore: I will ask that the last go out, to support that steel.

The Court: He is an engineer.

Mr. Wrigley: Q. Does anything else appear from that drawing or in that picture for which you made a charge against the Soule Steel Company?

A. On the other side, but there are some supports necessary to support the reinforcing steel.

The Court: Q. You say there are some supports. What are [78] the supports?

Mr. Wrigley: Q. Made of what? A. Steel.

Q. What sized steel?

A. Either rail or second hand iron that we purchased.

(Testimony of Loren Hunt.)

Q. Now, looking at this same picture and the so-called wooden portions of the pier, has that any connection with the reinforcing steel at all?

A. Are you referring to this portion on the outside of the forms?

Q. Yes, the lower left-hand corner.

A. No.

Q. Has any portion of that been charged against Soule Steel? A. No.

Q. Now, did the other abutments, 2, 3, and 4, have any similar upright steel reinforcing or supports for reinforcing steel put in by Union Paving Company?

Mr. Moore: I really think, your Honor, that asks for a conclusion. I think there should be an explanation as to how that was used in supporting the reinforcing steel, and not just the blanket statement that it was used.

Mr. Wrigley: I will come to that later. What I am trying to bring out, Mr. Moore, if I may state, these things for which he makes a charge in Abutment No. 1, none of them are in Abutments Nos. 2, 3, and 4.

Mr. Moore: I will withdraw the objection.

The Court: That is the way I understood it.

The Witness: That is, there were no steel rails to support it.

Mr. Wrigley: In the other three abutments.

The Court: In the other three.

Mr. Moore: You see, what I am questioning is whether reinforcing steel was necessary, or not.

(Testimony of Loren Hunt.)

The Court: You may cross-examine on that.

Mr. Wrigley: Q. I will show you next, Mr. Hunt, a picture that has been marked L-1 For Identification, and call your attention to a large amount of what appear to be wooden forms. All that was for the concrete, was it not?

A. That was for the concrete.

Q. Is any part of those wooden forms charged against Soule Steel Company? A. No.

Q. And you had similar exterior wooden forms on all the other abutments, didn't you?

A. We had similar forms.

Q. Showing you next the picture which is marked L-2 For Identification, that shows the Abutment No. 1 as the forms were stripped from the exterior concrete and the abutment was practically complete? A. That is right.

Q. And showing you this next picture, which is marked L- For Identification, abutment No. 1, what that illustrates is one side of the finished job and the rubble or rock being placed to hold the steel? A. That is right.

Q. Was any part of that charged up to—when I refer to that, I refer to the rubble rock—charged up to the Soule Steel Company? A. No.

Mr. Wrigley: We ask that this bunch of pictures be accepted in evidence as such, not for identification at this time.

Mr. Moore: No objection.

(Defendants' Exhibits L-1 to L-5, inclusive,

(Testimony of Loren Hunt.)

For Identification, were thereupon received and marked in evidence.)

Mr. Wrigley: Q. Mr. Hunt, can you describe for us the so-called placement of the reinforcing steel, what reinforcing steel and what sized reinforcing steel went into Abutment No. 1?

A. I believe the maximum size was inch and a quarter. [80]

Q. And that was placed how?

A. Over the tunnel section. It followed the contour of the forms of the arch, and on top, the upper mat over this section was horizontal. There was vertical steel around the edge of the mass section, and also on the other side, the arch.

Q. And that steel was placed before the concrete was poured, of course? A. Yes.

Q. Now, how was that reinforcing steel held in place prior to the pouring of the concrete? I am talking now about Abutment No. 1.

A. The steel was tied and supported by braces erected by Union Paving Company.

Q. What type of braces?

A. Wooden braces or steel braces, in the internal, in the inside section, and the last section was steel sections.

Q. And the wooden——

A. The wood over the arch was supported by what is known as dough-balls resting on our forms.

Q. Showing you the drawing that has been marked M For Identification, point out on that

(Testimony of Loren Hunt.)

where you used steel supports to hold the reinforcing steel?

A. We used supports, here, to hold this steel out here, and used steel supports up here (indicating).

Mr. Moore: Pardon me. Will you mark those on there?

Mr. Wrigley: Now we are asking for the steel supports.

Mr. Moore: Will you letter those in some way?

The Witness: These are approximate, three supports.

Mr. Wrigley: Three steel supports. Now, I want to change the color of this before you come to the wooden supports.

Q. The red illustrates the steel supports?

A. Put one there, too—I believe there was one there, (indicating).

Q. Now, the steel supports you have illustrated in red. Sketch in blue where the wooden supports to hold the reinforcing steel [81] were placed, roughly.

A. We used no wood.

Q. Oh, you used no wood?

A. Except these concrete dough-balls.

Q. Frankly, I do not understand, and I think the Court might desire further elucidation on what you mean by concrete dough-balls. What are they?

A. They are cubes, about 3 by 3, made up of sand and cement, that are placed under this steel along this arch to give the proper clearance.

Q. Are they put there as a form for the con-

(Testimony of Loren Hunt.)

crete, or are they put there to hold up the reinforcing steel?

A. They are put there to hold the reinforcing steel.

Q. Did they remain there?

A. They remained there. That was done by the Soule Steel.

Mr. Moore: Q. That was done by Soule?

A. That was done by Soule.

Q. Do I understand you to say now the dough-balls were put there by Soule? A. Yes.

Q. Furnished by whom?

A. The Soule Steel.

Mr. Wrigley: Q. As far as the dough-balls are concerned, there is no charge for placing them?

A. Soule Steel did all that.

Q. How are they held in place?

A. They are held in place by a little wire that is embedded in the dough-ball.

Q. Soule Steel did that, also?

A. That is right.

Q. Where was lumber used in any reinforcing or holding up the steel on Abutment No. 1?

(Discussion by the Court with Counsel in another case.)

Mr. Wrigley: The examination in which I was asking you about lumber was error on my part. I misread the statement.

Q. No charge is made against the Soule Steel Company for placing any lumber supports, so far as Abutment No. 1 is concern- [82] ed? A. No.

(Testimony of Loren Hunt.)

Q. Now, Abutment No. 1 was not only first in number, but it was also first in order of performance, was it not? A. That is right.

Mr. Wrigley: At this time I would ask that this drawing, which has heretofore been marked for identification, be accepted in evidence as Defendants' Exhibit M.

The Court: It may be admitted and marked.

(Defendants' Exhibit M For Identification was thereupon received and marked in evidence.)

Mr. Wrigley: Q. Showing you a photograph, can you tell us what that depicts, which pier?

A. Pier 2.

Q. That is Pier 2 on the south side of the Pit River.

Mr. Moore: May I be permitted to make a suggestion, your Honor? I have here a Government drawing which shows the location of these abutments and piers, and it may assist your Honor in following it.

Mr. Wrigley: I think it would help in following the whole case.

Mr. Moore: We might have it marked and I will explain it to your Honor. Abutment 1 that has been spoken of is here where there is a hill. The tunnel comes out at Abutment 2.

Mr. Wrigley: In other words, down here is Redding.

Mr. Moore: Abutments 2 and 3 are here, and then Abutment 4, to give your Honor the picture.

(Testimony of Loren Hunt.)

Mr. Wrigley: This illustrates the two levels, the highway and the railroad.

The Court: Where is Pier 2?

Mr. Wrigley: That would be this pier (indicating). I will ask that this be marked as Defendants' Exhibit next in order. [83]

(The drawing was thereupon received in evidence and marked "Defendants' Exhibit N.")

Mr. Wrigley: Does your Honor want this drawing before you?

The Court: I am familiar enough with it. I will follow you.

Mr. Wrigley: We offer in evidence Defendants' Exhibit next in order this photograph of what the witness has identified as being Pier 2.

(The photograph was thereupon received in evidence and marked "Defendants' Exhibit O.")

Mr. Wrigley: I do not know whether your Honor noticed particularly, but it applies to all of these piers, you will note in the bottom or base there is a very decided flare and a very wide base, but after they get to a certain point, then the slope is not as pronounced.

Q. Now, calling your attention to this picture on Pier 2, the uprights that appear there in all directions at an angle, that is the exterior reinforcing steel, is it not?

(Testimony of Loren Hunt.)

A. This is the exterior reinforcing steel, the two-inch square reinforcing steel.

Q. And the tower appears on one side of it. Now, was any portion of that tower charged to the Soule Steel Company? A. No.

Q. Was that tower used as support for the Chicago boom that was used to raise the reinforcing steel? A. It was.

Mr. Moore: I object to the form of the question, raising the reinforcing steel for that sole use. It was used for other purposes, too.

Mr. Wrigley: That is correct.

Mr. Moore: By the Union Paving Company.

The Court: Since there was no charge for that, why not go to matters that were charged, so we would not be consuming so much time? [84]

Mr. Wrigley: I wanted to show that certain items that appeared here were not charged to them, and what inside work was charged.

The Court: We are not concerned here with what was not charged, but what was charged.

Mr. Wrigley: Q. Now, on that picture, the charge that was made against the Soule Steel Company was for what work and what materials?

A. For the vertical railroad rail inside the reinforcing steel, the horizontal 6 by 6's and the 2 by 6's.

The Court: Q. Is the horizontal 6 by 6's the wooden structure?

A. That is the wooden structure. There is one

(Testimony of Loren Hunt.)

horizontal right in there, and the 2 by 6 cross bracing.

Mr. Wrigley: Q. In other words, your testimony given yesterday as to Pier 4—

The Court: This is Pier 2, isn't it?

Mr. Wrigley: Q. Pier 2—is the same here, that all the interior framework or falsework was charged a hundred per cent to Soule Steel Company? A. That is right.

Q. And all of the exterior work was charged 100 per cent. to Union Paving Company?

A. That is right.

Q. Now, that applied to which piers, in which that procedure was followed?

A.. Piers 1 to 7.

Q. 1 to 7, inclusive, a hundred per cent of all inside falsework was charged to them. Mr. Hunt, to clear up a matter that Mr. Dowling calls my attention to, an apparent conflict with your testimony yesterday, in which piers were there inside cores? A. Piers 3 and 4.

The Court: Q. Were all other piers solid piers?

A. Piers 1, 2, 5, 6, and 7 were solid.

Q. Just two that had cores in them?

A. That is right. [85]

Mr. Wrigley: Q. Was any part of the cost of constructing those interior cores charged to Soule Steel Company? A. No.

Mr. Wrigley: Yesterday, may it please the Court, two large photographs were marked, respectively, A and B For Identification on Pier 4. I

(Testimony of Loren Hunt.)

would ask that they be accepted in evidence at this time.

Mr. Moore: No objection.

(Defendants' Exhibits A and B For Identification were thereupon received and marked in evidence.)

Mr. Wrigley: I will ask the Clerk at this time to mark this photograph for identification only.

(The photograph was marked "Defendants' Exhibit P For Identification.")

Mr. Wrigley: Q. Mr. Hunt, showing you a photograph, which is marked "Defendants' Exhibit P For Identification," can you tell us what piers are there shown?

A. This is Pier 8, 9, 10.

Q. Was any interior falsework used on piers 8, 9 and 10? A. No.

Q. So no charge for any interior falsework was then made against Soule for those piers?

A. No.

Mr. Wrigley: We offer this photograph in evidence.

(Defendants, Exhibit P For Identification was thereupon received and marked in evidence.)

Mr. Wrigley: Q. Showing you, Mr. Hunt, this photograph, can you tell us what that depicts?

A. It depicts the welding operation of the two-inch steel.

(Testimony of Loren Hunt.)

Q. Is that steel in final place after it was welded?
A. Yes.

Q. Its permanent position. How far apart were these so-called two-inch steel bars?

A. Approximately six inches, center to center.

[86]

Q. And both the inside pier and the outside pier are approximately the same distance apart?

A. Yes, you have to realize those piers are on a batter.

Q. Pardon me for interrupting you. You say they are on a batter. What do you mean by the word "batter"?

A. They are inclined. They vary. The batter, in the lower portions, is three inches in twelve; that is, you go up twelve inches, you go in three inches; and that batter changes to at the top I believe it is $\frac{1}{8}$ of an inch in twelve inches.

Q. So would that mean that your bars are slightly closer at the top than they are at the bottom?
A. They are.

Q. This question may be leading. As you go up there is a less number of bars as you go up?

A. Yes, a certain number of bars drop out.

Q. Can you tell us as to, we will say, Pier 3, the approximate size of that pier at its base?

A. I believe it was 90 by 95 feet.

Q. When it got to the extreme top——

A. The extreme top, the web was 5 feet wide and the two columns, I believe, were about 15 feet

(Testimony of Loren Hunt.)

square, and the entire length of it was very close to 50 feet.

Q. You have used the word "web." What do you mean by the web?

A. I believe you can show that by one of the pictures of the finished product.

Mr. Moore: We make no objection, but I do not see what that has to do with this controversy.

Mr. Wrigley: We offer this photograph as Defendants' Exhibit next in order. That is the one of the steel.

(The photograph was received in evidence and marked "Defendants' Exhibit Q.")

Mr. Wrigley: Q. Mr. Hunt, looking at this picture, tell us [87] which pier is.

A. That is Pier 1.

Q. The first pier as you leave the Abutment No. 2 on the south side? A. That is right.

Q. Now, in general appearance, outside of the fact that some piers were higher than others, as you went down toward the river, were all of the piers, 1 to 7, generally of that type and appearance?

A. Generally, yes.

Q. And they would all slope similar to this one?

A. It varied according to the height.

Q. When you referred to the web, what portion of the picture—in other words, what portion of the pier do you call the web?

A. It is the portion where the ladder and the man is on the ladder, between the two columns.

Q. The web is the portion tying the two exterior

(Testimony of Loren Hunt.)

parts—in other words, in the form of an “H” from the top, isn’t it? A. Approximately.

Q. Taking from the extreme sides, as I would call them, of these piers, how wide were they overall? A. At the top?

Q. Yes.

A. To the best of my recollection it was 50 feet.

Q. Now, were all these piers, 1 to 7, similar in design as Pier 1, with a web like that? A. Yes.

Q. Where would the reinforcing steel be in that pier?

A. The two-inch reinforcing steel is around the perimeter.

Q. Also the web portion?

A. In the web portion, too.

Q. The web portion, also. In other words, the two rows of two-inch steel around the outside in all the piers, 1 to 7, were similar?

A. They were similar, except at the top. That two-inch steel in some piers dropped down to, I believe, an inch and a quarter.

Mr. Wrigley: We offer this picture next in order. [88]

(The photograph was admitted in evidence and marked “Defendants’ Exhibit R.”)

Mr. Wrigley: Q. Showing you another picture, and starting from the right-hand side, what piers show there? The pier that appears to be completed on the right-hand side—which pier is that?

A. Pier 1 and Pier 2.

Q. Pier 2 in the course of construction?

(Testimony of Loren Hunt.)

A. That is right.

Q. On the left-hand side, low down, what is that structure that appears there?

A. That looks like Pier 4.

Q. Which is across the river from Pier 3?

A. Across the river.

Q. Then coming up the hill, directly above that, on the left-hand side, are what piers?

A. 5, 6, and 7.

Q. In the course of construction? A. Yes.

Q. The other piers, from 8 on, and the abutments, 1, 2, 3 and 4, do not show here, at all?

A. Abutment 4 you can faintly see.

Mr. Wrigley: We offer this next in order.

(The photograph was received in evidence and marked "Defendants' Exhibit S.")

Mr. Wrigley: Q. Calling your attention, Mr. Hunt, again to Defendants' Exhibit B, and the interior falsework, at the time that picture was taken was that falsework serving any purpose other than to hold the reinforcing steel?

A. At Elevation 903, as marked on the picture, it is holding the reinforcing steel.

Q. Showing you Defendants' Exhibit A, the interior falsework shown at those elevations, was that at that time being used for any purpose other than to hold the reinforcing steel?

A. Not at an elevation above 863.

Q. You knew Mr. Stevens on the job, did you not? A. Yes.

(Testimony of Loren Hunt.)

Q. Was he on the job for the entire period of the work?

A. He was there most of the time. He was there practically a [89] hundred per cent.

Q. Did he leave that job for other jobs at any time?

A. I don't know whether he left for other jobs.

Q. Did he leave there so he was not in charge?

A. During the time we were constructing Pier 1, Mr. Sparling was in charge. I don't think it was very long—three weeks, approximately.

Q. I believe the evidence showed that the last steel went in in May of 1941; was Mr. Stevens there at that last work?

A. He was there most of the time.

Q. On Pier 4?

A. He left for short periods of time but not for long.

Q. On Pier 4, when Mr. Stevens was not there, who was in charge? A. Mr. Klein.

Q. Did you have any conversation at any time with Mr. Stevens with reference to this interior falsework?

A. Approximately what time? I had various conversations.

Q. How early did you have any conversation with Mr. Stevens? Can you fix—

A. I couldn't fix any date.

Q. Was it in 1940 or 1941?

A. We had some discussion in 1941.

(Testimony of Loren Hunt.)

Q. We will go back to 1940, which was the year the job started. A. 1939 it was started.

Q. Yes. When you started the actual work of erecting the steel, the reinforcing steel.

A. In Pier 1?

Q. Any point on the entire project.

A. I discussed it with Mr. Cochrane, the superintendent.

Q. You were there when that first steel started, were you not? A. I was there then.

Q. Can you give us the approximate date the first reinforcing steel was put in place?

A. In the middle of March in Abutment 1.

Q. Prior to that was any reinforcing steel put in place in any [90] of the piers and abutments?

The Court: What was that date, March what?

The Witness: I think our first pouring in Abutment 1 was March 21st or 22nd.

The Court: Q. 1940, or 1941?

A. 1940, and it was necessary to place the steel prior to that.

Mr. Wrigley: Q. Did Soule Steel Company turn in regularly, in accordance with the correspondence, their payrolls on that work?

A. They turned it in to the U. S. Bureau of Reclamation direct.

Q. Did you make a tabulation showing what those payrolls amounted to of the Soule Steel Company on that entire job?

A. We had that done.

(Testimony of Loren Hunt.)

Mr. Moore: I am going to object. I do not see what relevancy it has. Soule paid their labor.

Mr. Wrigley: The relevancy, as I see it, is this, that you are claiming \$22.50 a ton, you say for all the work, we say for half the work. We say that your construction is not in keeping with the facts shown by your own costs, that it cost you less than \$10 a ton up there to do that work. The witness will develop that from the facts.

Mr. Moore: If you are going to take the entire cost, but if you take the labor cost——

Mr. Wrigley: The labor cost is only one item.

Mr. Moore: That is only one item.

Mr. Wrigley: That is correct.

Mr. Moore: I do not see how they can prove what it cost you to do a job. I do not see what relevancy that has to the provisions of the contract, your Honor. I am going to object to this line of questioning as incompetent, irrelevant, and [91] immaterial, whether Soule made a profit or did not make a profit.

The Court: We are not here concerned with profit or who made it.

Mr. Wrigley: Q. Mr. Hunt, this book I would ask you to examine and tell us——

Mr. Moore: We will stipulate that that is the Government plans and specifications.

Mr. Wrigley: The printed specifications.

Mr. Moore: The printed specifications.

Mr. Wrigley: And we will stipulate, so the

(Testimony of Loren Hunt.)

record is clear on it, that, as previous witnesses have pointed out, the drawing accompanying this was on a small scale.

Mr. Moore: That is correct.

Mr. Wrigley: The large scale drawings contain more detail, and there are other drawings which supplemented these that contain further detail.

Mr. Moore: That, I assume, may be correct. I would have to confer. I know they are large scale drawings, your Honor. Whether there are supplemental drawings, I never went into it.

Mr. Wrigley: We offer this copy in evidence. It is not the original, but it is a copy of the printed specifications relating to this project.

(The document in question was received in evidence and marked "Defendants' Exhibit T.")

Mr. Wrigley: Q. Mr. Hunt, with reference to the size of the steel, first, was the same sized reinforcing steel used in all the piers? What was the largest sized steel that was used there for reinforcing?

A. Two inch square. [92]

Q. And the smallest size used for exterior reinforcing?

A. I believe it is $\frac{3}{4}$ of an inch. Those are the horizontals.

Q. In the verticals, what is the smallest exterior reinforcing steel used?

A. I believe it was 1 inch. That was 8, 9, and 10.

(Testimony of Loren Hunt.)

Q. 8, 9, and 10, 1 inch. Now, the testimony yesterday brought out that the total tonnage of reinforcing steel was something slightly in excess of 5000 tons. Can you give us, roughly, what percentage or portion of that went into those piers 3 and 4 on the north side and south side of the river, respectively?

A. I would say roughly between about 45 per cent, maybe 50 per cent.

Q. Into those two piers alone? A. Yes.

Q. Were they the first ones done, or the last ones done?

A. They were the last ones. It was around half.

Mr. Wrigley: That is all.

The Court: We will take a recess.

(Recess.)

Mr. Wrigley: With the permission of the court and counsel, I would like to ask a few further questions I had forgotten. I thought I had completed the examination, but in looking at my notes I found I had not.

Q. Mr. Hunt, throughout I referred to the fact that there were two rows of exterior reinforcing on the piers. Was that on all the piers throughout their entire distance? A. No.

Q. Where was there any variation in the number of tiers?

A. There was variations on 2, 3, 4, and I believe 5 and 6.

Q. What was that variation?

(Testimony of Loren Hunt.)

A. Well, on Pier 3, there were three tiers at the bottom, and those tiers dropped out as they went up and ended up with one tier at the top. In Pier 4 [93] there were four tiers to start.

Q. Whether there were two tiers, three tiers, or four tiers, in each case they were held apart by separators, and those separators were made of what? A. 3 by 4 spacers.

Q. Were those separators removed later?

A. They were removed, yes.

Q. How were they removed?

A. They were cut up.

Q. So that it was not possible to use them again, or was it possible?

A. It was not possible.

Q. With reference to the 6 by 6's and the 2 by 6 interior falsework or framework, was that used over? A. Yes, to some extent.

Q. Explain what you mean by "to some extent"?

A. Well, it was necessary to remove all the lumber as the concrete came out, and that, in turn, was lowered to the ground, and what was usable was used again.

Mr. Moore: May I have that answer read?

(The reporter read the answer.)

The Witness: Can I correct that? There was concrete—as the concrete came up, not out.

Mr. Wrigley: Q. So that all 6 by 6's and the 2 by 6's in that interior work would be used over several times if they were usable?

(Testimony of Loren Hunt.)

A. That is right.

Q. Was it ever possible to use the so-called separators over?

A. Maybe in an isolated case or two, but actually they were cut in small pieces.

Q. Showing you what has been marked "Defendants' Exhibit K For Identification," that, you testified yesterday, was a correct copy of your summary of the charges.

A. Yes.

Q. As to the labor, and insurance, and equipment, you testified yesterday that came from the daily sheets and the daily summa- [94] ries. How was the daily record—in other words, from what did you draw your figures as to the lumber?

A. We made notes at the time in a book, and at the end of the week it was summarized as cost.

Mr. Moore: What was that last answer?

(The reporter read the answer.)

Mr. Wrigley: Q. As to the charges here for lumber, then, that is taken from your notes, and you charged only the lumber that was used for the interior falsework in these figures?

A. That is right.

Q. Now, as to the steel, how was the record as to the steel kept in the first instance?

A. I don't follow you on the first instance.

Q. Well, before you made up the summary, where was the record of the steel kept?

A. It was kept in a book, the same as the lumber. All materials were kept daily.

(Testimony of Loren Hunt.)

Q. And this summary was made up from those detailed statements that appear in that book as to the lumber and the steel?

A. That is right.

Q. About the records as to the welding and the welding rods? A. That is the same.

Q. And the bolts and the nuts, and the nails?

A. That is the same.

Mr. Wrigley: At this time, if the Court please, we offer in evidence this which has heretofore been marked "Defendants' Exhibit K For Identification," not as proof of anything other than the fact that this is a correct summary made up by him of his detailed charges against them.

Mr. Moore: We have no objection.

(Defendants' Exhibit K For Identification was thereupon [95] admitted in evidence and marked "Defendants' Exhibit K.")

(Testimony of Loren Hunt.)

DEFENDANT'S EXHIBIT K

TEMPORARY SUPPORTS
FOR REINFORCEMENT STEEL, TEMPLETS, SPACERS, ETC.,—PIT RIVER BRIDGE

Piers	Labor	Insurance	Equipment	Lumber	Steel	Oxy, Acety. & Weld. Rods	Bolts, Nuts, Etc.	Nails
1	\$ 688.75	\$ 95.96	\$	\$ 23.48	\$ 57.54	\$ 44.50	\$	\$
2	4,693.12	654.29	10.85	630.94	1,629.84	144.19	327.34	49.44
3	11,556.52	1,608.75	98.50	2,370.26	1,451.70	570.80	874.37	64.89
4	7,301.54	1,023.55	92.80	2,043.28	1,776.04	357.02	491.66	64.63
5	2,152.26	301.17	25.20	230.18	417.16	135.78	257.51	18.54
6	2,123.73	302.26	31.20	96.17	194.55	62.95	129.64	10.30
7	1,920.49	264.51	.....	285.18	207.83	51.91	173.21	12.36
Abt. No. 1	2,545.40	310.74	49.50	.....	369.18	11.10	.....	.....
Total	<u>\$32,981.81</u>	<u>\$4,561.23</u>	<u>\$308.05</u>	<u>\$5,679.49</u>	<u>\$6,103.84</u>	<u>\$1,378.25</u>	<u>\$2,253.73</u>	<u>\$220.16</u>
GRAND TOTAL	<u>\$53,486.56</u>							
10% Supervision and Incidentals	5,348.66							
Miscellaneous Charges:								
Moving and Repairs to Boom	\$ 1,893.82							
Additional Miscell. Charges	383.58							
TOTAL	<u>\$61,112.62</u>							

[Endorsed]: Filed 4/9/43.

(Testimony of Loren Hunt.)

Mr. Wrigley: Q. Now, Mr. Hunt, in addition to the charges made against the Soule' Steel Company for interior falsework or framework, were there other charges made against Soule' Steel Company? A. There were.

Q. Did you prepare a list of those charges?

A. Yes.

Q. Have you a copy of that list with you?

A. No, you have it in your hand.

Q. No, this is my copy.

A. In that folder.

Q. Mr. Hunt, calling your attention to a tabulation which I have marked roughly, "C" in pencil, was this tabulation made up by you?

A. That was made up from information that I furnished the San Francisco office.

Q. Where were the records kept on these various items? How were they kept before the tabulation was made?

A. All the records were originally taken from the daily summaries.

Q. And that which I have listed on "C" is the charges that you have made against Soule' for what type of work?

A. In reference to moving their boom, Chicago boom, the derricks, and work in connection with that.

Q. Showing you next what I have marked "D", tell us what that sheet was made up from.

A. This is made up from various incidental charges.

(Testimony of Loren Hunt.)

Q. Have you checked this list over and the descriptions—for instance, we will say 9/30/40 Repair boom, Pier 2, \$128.86—in each case you have checked and verified that you have made such a charge against the Soule Steel for that item on that date? A. Yes.

Mr. Wrigley: We offer C and D as one exhibit, Defendants' Exhibit next in order. [96]

(The documents were received in evidence and marked Defendants' Exhibit U.'')

Mr. Wrigley: That is all.

Cross-Examination

By Mr. Moore:

Q. Mr. Hunt, approximately what date did they start work on Abutment No. 1?

A. Will you clarify that and say who was "they"?

Q. The Union Paving Company.

A. We began in December.

Q. What was the first work performed by the Union Paving Company?

A. The first work was excavation.

Q. That excavation, I assume, went down to levels established by the Government Engineers, is that correct? A. That is right.

Q. Drawing your attention to Defendants' Exhibit N, this was a hillside on the right-hand side of Section FF, was it not?

A. That is right.

Q. And that was excavated down leaving steps

(Testimony of Loren Hunt.)

in the hill, or rock steps on the right-hand side, is that correct?

A. Those we did not—the final excavation did not look like that—rugged.

Q. The section on the left-hand side of this drawing was excavated down to the base, here, is that correct? A. That is right.

Q. And after you had excavated, what was the first step that took place there in the construction?

A. The first step was to build the forms.

Q. Where were those built?

A. Right in here.

Q. Who built those?

A. Union Paving Company.

Q. And then what was the next step?

A. The Soule Steel put dowels in.

Q. The dowels were this shape, and they came down here, is [97] that correct?

A. That is right. Permission was given to dowel that.

Q. And then the steel was put in. Were these dowels extending up above—what were they, about 10 feet high above base?

A. Here it is—11 foot 6 inches.

Q. 11 foot 6 inches from the base of the excavation, is that correct? A. That is right.

Q. How were those dowels seated on the base, there?

A. They were seated, resting on dough-balls, or concrete blocks.

Q. Those dough-balls were installed by whom?

(Testimony of Loren Hunt.)

A. Soule Steel.

Q. And the steel uprights or dowels were installed by whom? A. Soule Steel.

Q. How were those held in place at the time?

A. They are usually—usually a stringer goes down through there, or a timber that they tie it to.

Q. As a matter of fact, they practically stand on their own base, do they not?

A. That is right, that was just to hold it from swaying.

Q. And that was supported by braces put in by Soule, is that correct?

A. I imagine. I don't know.

Q. And then there was a pour, and this space was poured, is that correct?

A. That is right.

Q. Who poured that?

A. Union Paving Company.

Q. So we have this with these dowels sticking up, is that correct? A. That is correct.

Q. Was that same process followed on the right-hand side?

A. That is right. This was blocked off.

Q. What was the next step in construction after that? You have the dowels sticking up. What was the next step?

A. Building the forms. [98]

Q. By the forms you mean this outside form, here? A. And the inside form.

Q. That was done by whom?

A. The Union Paving Company.

(Testimony of Loren Hunt.)

Q. This form that goes around and makes the arch, how was that form supported?

A. We had ribs cut direct to that shape, placed, and it was supported by timber falsework.

Q. In other words, the inside, here, was supported by timber falsework supporting this arch, is that correct?

A. That is right.

Q. And then this side form wall was put up, is that correct?

A. That is right.

Q. And that was supported, this side wall was supported by cross timbers to the arch, wasn't it?

A. It was not supported, no. This had two booms free.

Q. How was this side wall——

A. It was braced.

Q. After this arch had been put in and this wall put in, what was the next step in construction?

A. We built this wall, too.

Q. You built that wall; that was another form. After that what was the next step?

A. Placing the reinforcing steel.

Q. Well, then, Soule came in after these side forms had been put in and this arch with the interior bracing and this form on the right-hand side, and Soule came in and placed the reinforcing steel, is that right?

A. That is right.

Q. These were bent so that they came across the top of the arch, and these lines lapped at the top, is that correct?

A. That is right.

Q. And then they were welded to the dowels?

(Testimony of Loren Hunt.)

A. Not welded.

Q. How were they fastened? A. Lapped.

Q. Lapped to the dowels?

The Court: Q. What do you mean by "lapped"?

A. One part [99] went by the other 50 inches.

Mr. Moore: Q. And then the vertical bars were placed here, is that correct, along the side?

A. That is right.

Q. And how were they held?

A. Those vertical bars supported more or less themselves. They were tied more or less to the form.

Q. We have that wooden arch in and the side walls, and the reinforcing steel across the top of the arch. What was the next step?

A. It was necessary to place this horizontal steel.

Q. Then the horizontal steel was placed across the top of the arch, is that right?

A. That is right.

Q. How was that supported?

A. It was supported by this indication with steel (indicating).

Q. This steel—— A. Yes.

Q. And they were based on the ground, were they? A. That is right.

Q. Those are the railroad irons that you refer to, is that correct?

A. Railroad iron, structural steel shakes.

(Testimony of Loren Hunt.)

Q. You have the cantilever across the top here. What was the next step?

A. The next step is to place our runways.

Q. Where were your runways?

A. On the top.

Q. Now, on one side of this or the other you erected a hoisting tower, did you not?

A. Directly in front.

Q. How high was that hoisting tower?

A. It was above the height of this.

Q. Probably about 75 feet, was it not?

A. Approximately, yes.

Q. Then from the next abutment down the hill is Abutment 2, is it?

A. That is right.

Q. And then Pier 1?

A. Pier 1.

Q. And from this same hoisting tower there was a trestle or run- [100] way built to Pier 2—I mean to Abutment 2—and then to Pier 1, is that correct?

A. That is right.

Q. And this hoisting tower, then, was used for the purpose of hoisting the concrete up there to deliver it into hoppers?

A. That is right.

Q. And from that point, through the medium of buggies, over the trestle work, and on this, over runways, the concrete was poured on Abutment 1, on Abutment 2, and Pier 1, is that correct?

A. That is right.

Q. Out of that one tower.

A. That is right. This tower, by the way—we used the tower, yes. That is right.

(Testimony of Loren Hunt.)

Q. Having gotten this in, then the concrete was poured, is that right? A. That is right.

Q. And the weight of the concrete would fall on this arch, too, would it not?

A. That is right.

Q. Now, the lumber you put in here you did not charge the Soule people for, is that correct?

A. No, no charge.

Q. You did charge them for this upright iron, is that correct? A. That is true.

Q. Did you charge them, aside from acetylene and that, for any other material that went into Abutment 1? A. No.

Q. How much iron went in there, do you know?

A. Oh, I would say maybe nine ton of rail, maybe ten ton of rail.

Q. Have you any figures? A. Yes.

Q. Will you get them and tell us how many tons of rail or whatever it was that went in there, and at what price you charged it?

A. I haven't got those here.

Mr. Wrigley: Q. You mean you haven't got them here in court?

A. Yes.

Mr. Moore: Q. Will you have them this afternoon? [101] A. Yes, I will get them.

Mr. Wrigley: May I say, so we can get clear, these statements that you will bring out bear not only on No. 1, but the steel in all the piers and abutments that you charged against them?

The Witness: That is right.

(Testimony of Loren Hunt.)

Mr. Moore: Q. I call your attention to Exhibit K, which is a summary of your charges. The only material that you charged was the steel other than the rental of some equipment. There was some acetylene and one thing and another, is that correct?

A. That is right.

Q. You charged \$369.18 for this steel, and that is the steel you just described, is that right?

A. That is right.

Q. What was the rental of the equipment that you charged?

A. Well, rental of equipment—we used different pieces of equipment. We have a normal rate. We charge ourselves for that operation, which includes principally the operating cost.

Q. Well, that \$49.50, what is that? What equipment is that?

A. For instance, it might be a truck.

Q. Do you know what it is?

A. I can't tell you right off now.

Q. Will you get that information, please? Now, you have \$2545.40 for labor. What labor was that that you make a charge of \$2545 for?

A. That was labor turned in by the forces in the field.

Q. What was that labor used for, and what portion of the erection?

A. The erection of the falsework.

Q. What falsework?

A. Falsework—that, in the start of the job, is not clear.

(Testimony of Loren Hunt.)

Q. Well, coming back to this diagram which is Exhibit M, was any of that labor devoted to the forms, the placing of the forms [102] which are on the outside? A. Not any of the forms.

Q. Was any of that labor devoted to putting in the arch?

A. At that time we had falsework and runways accumulated together, and it might be, but there was an attempt to separate.

Q. It did not take \$2545 worth of labor to put up these iron uprights that are in the mass, did it?

A. I couldn't say.

Q. You made up these figures, did you not?

A. That is right.

Q. Haven't you any compilation of what that labor was devoted to which you attempt to charge us \$2545 for?

A. That was to put up the falsework.

Q. What falsework, again?

A. Well, it isn't the entire charge of the falsework; it is a portion of the falsework charge.

Q. I will come to something else. When this job was started there was a chart of accounts prepared by someone in the home office here in San Francisco, was there not? A. Yes.

Q. I will hand you a photostatic copy of the chart of accounts and ask you to examine that and tell me if that is the same chart of accounts which this work was started under (handing a document to the witness). A. Yes.

Q. You recognize that, do you? A. Yes.

(Testimony of Loren Hunt.)

Q. In keeping your cost accounts at the beginning of this job, you used the signals or indicia that is on this chart of accounts, is that right?

A. Yes.

Mr. Moore: We will offer this chart of accounts, your Honor, in evidence and ask that it be marked with a proper number.

(The document was marked "Plaintiff's Exhibit 16.")

PLAINTIFF'S EXHIBIT No. 16

CHART OF ACCOUNTS (Revised) PIT RIVER PROJECT—CONTRACT No. 281

Account No.

01	General Overhead	
01-1	Super. & Assistants	Salaries
01-2	Engineers	Salaries
01-3	Accountant & Timekeepers	Salaries
01-4	Pickup men	Labor only
01-5	Watchmen	Labor only
01-6	Autos & Pickups—Expense	
01-7	Field Office Expense	
01-8	Expense Accounts	Supervisory
01-9	Engineering Expense	Misc. Labor, blue-prints, supplies, etc.
01-10	Road, Property Tax & Misc. Taxes & Insurance (Show what)	
01-11	Automotive—Licenses & Insurance	
01-12	Erect & Repair—Office and Sheds	
01-13	Rentals—Land	
01-14	Miscellaneous	Show what
02	Plant and Equipment	
02-1	Master Mechanic	Salary
02-2	Electricians & Helpers	Salaries
02-3	Grease Monkeys	Labor
02-4	Move Equipment In (all charges)	
		Show kind of equipment moved

(Testimony of Loren Hunt.)

PIT RIVER CHART OF ACCOUNTS—(Continued)

Account No.

- 02-5 Move Equipment Out (all charges)

Show kind of equip-
ment moved
- 02-6 Shop Work & Repairs—Plant & Equip. (all charges for repairs to equipment charged to job costs at hourly rate Show kind & number of equipment).
- 02-7 Shop Work & Repairs—(Not chargeable to above or other items).
- 02-8 Electric Plant Setup
- 02-9 Electric Plant Repairs & Maintenance (except 02-2 above)
- 02-10 Power Charges—(Bills from power co. for energy charge)
- 02-1 Water System—(Installation, repairs & maintenance (all charges).
- 02-12 Air Lines—(Installation, repairs & maintenance (all charges).
- 02-13 Concrete Plant—
Bunkers—Erection
- 02-14 Concrete Plant—) Repairs & operating costs
Batcher & Conveyors) to be charged at hourly
—Erection) rate.
- 02-15 Concrete Plant—
Silo at Job
- 02-16 Concrete Plant—Silo at Redding (All repairs & operating costs charge to item "Unload & haul cement).
- 02 Equipment Purchases (Property account)
- 03-1 Excavation Equipment
- 03-2 Concrete Equipment (Show if for batcher, silo, etc.)
- 03-3 Automotive Equipment (Autos and trucks)
- 03-4 Shop tools and equipment
- 03-5 Other Equipment
- 04 Roads
- 1 Clear Right of Way
- 1-1 Cut trees and brush

(Testimony of Loren Hunt.)

PIT RIVER CHART OF ACCOUNTS—(Continued)

Account No.

- 1-2 Burn
- 1-3 Pull stumps
- 2 Common Excavation
 - 2-1 Bulldozers & carryalls. Show cu. yds. done
 - 2-2 Shovel or dragline. Show cu. yds. done
 - 2-3 Haul
 - 2-4 Miscellaneous
- 3 Rock Excavation (Labor & Equipment only)
 - 3-1 Drill & Shoot
 - 3-2 Mucking (Show cu. yds. moved)
 - 3-3 Cleanup
 - 3-4 Bracing
 - 3-5 Miscellaneous (Show what)
- 3A Rock Excavation (Materials only)
 - 3a-1 Powder & shooting supplies (no steel—see 2-3)
 - 3a-2 Lumber, nails, etc. for bracing.
- 2-3 Excavation (Tools, Drills, etc.)
 - 23-1 Drill steel & gads (includes labor sharpening)
 - 2-3-2 Misc. Grading tools & supplies (not in property account)
 - 2-3-3 Repairs—Misc. grading tools (not on hourly rate)
Includes all costs for repairs.
- 4 Backfill
 - 4-1 Cat Work (Bulldozer & carryall)
 - 4-2 Shovel or dragline work
 - 4-3 Haul—Trucks
 - 4-4 Miscellaneous
- 5 Compact Backfill
 - 5-1 Machine Compaction (quantity)
 - 5-2 Hand Compaction (quantity)
 - 5-3 Miscellaneous
- 6 Dry Rock Paving
 - 6-1 Haul
 - 6-2 Place
- Conc. A Haul Aggregates—From Redding to Bunkers
 - a-1 Trucks & Drivers—hauling. (Show tons hauled)
 - a-2 Foreman
 - a-3 Flagmen
 - a-4 Miscellaneous

(Testimony of Loren Hunt.)

PIT RIVER CHART OF ACCOUNTS—(Continued)

Account No.

- Conc. B Unload & Haul Cement—From Redding to Job
 - b-1 Unload cars & load trucks (Redding)
 - b-2 Redding Silo Expense. (Repairs, power, etc.)
 - b-3 Trucks & drivers—hauling. (Show barrels hauled)
 - b-4 Miscellaneous
- Conc. C Form Materials
 - c-1 Lumber
 - c-2 Plywood and hardwood
 - c-3 Nails and hardware
 - c-4 Miscellaneous
- Conc. D Falsework & Runways (Materials only)
 - d-1 Lumber
 - d-2 Nails and hardware
 - 4-3 Miscellaneous
- Conc. E Sundry Concrete Tools and Supplies
 - e-1 Tools and supplies purchased
 - e-2 Repairs to concrete tools
- 7 Concrete in Abutments
 - 1 Forming (Except materials). Show sq. ft.
 - 2 Strip Forms and move
 - 3 Build Falsework (except materials)
 - 4 Build Runways
 - 5 Batch
 - 6 Haul to Mixer
 - 7 Mix
 - 8 Place Show cu. yds.
 - 9 Cure
 - 10 Sand Blasting. Show sq. yds.
 - 11 Finish
 - 12 Move Concrete equipment
 - 13 Miscellaneous
- 8 Concrete in Piers
 - Detail 1 to 13 as above.
- 9 Piers No. 1-7. Above Top of Bases
 - Detail 1 to 13 as above.
- 10 Piers 8-9-10
 - Detail 1 to 13 as above.

(Testimony of Loren Hunt.)

PIT RIVER CHART OF ACCOUNTS—(Continued)

Account No.

- | | |
|----|------------------------------------|
| 11 | Reinforcing Steel (Sub Contracted) |
| 12 | Welding 2" Bars (Sub Contracted) |
| 13 | Cooling Concrete |
| 1- | Operate pump and pipe line |
| 2- | Grouting |
| 3- | Miscellaneous |
| 14 | Install Metal Tubing and Fittings |
| 1- | Haul |
| 2- | Place |
| 15 | Special Concrete Finish |
| 1- | All operations |
| 16 | Waterproof Concrete Surface |
| 1- | Haul |
| 2- | Apply |
| 17 | Install Metal Expansion Joints |
| 1- | Haul |
| 2- | Place |
| 18 | Place Anchor Bolt Welds |
| 1- | Haul |
| 2- | Weld |
| 3- | Place |
| 19 | Install Metal Conduits |
| 1- | Haul |
| 2- | Place |
| 20 | Install Electric Cables |
| 1- | Haul |
| 2- | Place |
| 21 | Const. Sewer Pipe |
| 1- | Haul |
| 2- | Excavate |
| 3- | Lay |
| 4- | Backfill |
| 22 | Install Misc. Metal Work |
| 1- | Haul |
| 2- | Place |

[Endorsed]: Filed 4/9/43.

(Testimony of Loren Hunt.)

Mr. Moore: Q. I will call your attention to Accounts 7-1, Concrete and abutments, with thirteen breakdowns under this No. 7.

A. That is right.

Q. No. 1 being Forming, 2 Strip forms, 3 Build falsework, 4 Build [103] runways, and Batch, and so on. I will also call your attention to Item No. 1, which is Reinforcing steel, subcontract. At the inception of this work was any of this labor or materials charged by you under Item 11?

A. No.

Q. It was all charged under Item 7 to Concrete and abutments, is that correct?

A. That is right.

Q. Who instructed you as to how you should make charges there at the inception of the job?

A. It was agreed between Mr. Cochrane and myself.

Q. Mr. Cochrane and yourself and Mr. Dowling?

A. And Mr. Dowling.

Q. In other words, when you opened up your cost books, you used this chart of accounts and segregated your costs in accordance with the instructions by Mr. Dowling, is that correct?

A. And Mr. Cochrane.

Q. And none of this labor or materials were charged to Item 11, which is Reinforcing steel, is that correct?

A. That is right.

Q. And all of it was charged to Item 7, being Concrete in abutments, is that correct?

A. That is right.

(Testimony of Loren Hunt.)

Q. And that form of charge, so far as Abutment No. 1 is concerned, continued throughout the construction of Abutment No. 1, is that correct? A. That is right.

Q. When was Abutment No. 1 finished, completed?

A. The concrete portion of it, or when it was turned over to the Government? I think it was turned over to the Government in July.

Q. When was the actual work finished?

A. It was back-filled in connection with it, you know, and I think the last pour was in April.

Q. That is April, 1940, is that correct?

A. That is right.

The Court: April, 1940. [104]

Mr. Moore: April, 1940.

Q. Up to that time all labor and materials had been charged to items other than Reinforcing steel, is that correct? A. That is right.

Q. And had been charged to Pouring concrete, or other items of that character?

A. That is right.

Q. At the time it was turned over to the Government, those accounts still, cost accounts, still remained in the same condition, is that true?

A. That is right.

Q. And they did remain in that condition until what time? A. In October, 1940.

Q. In the latter part of October, 1940, is that correct?

A. We were instructed, I think, in a letter from

(Testimony of Loren Hunt.)

Mr. Lawton to change those accounts somewheres around—I don't think it was quite the latter part, because the thing was all set up and we were going on the theory——

Q. Have you that letter? A. No.

Mr. Moore: Will you produce that letter from Mr. Lawton? If you will look for it, I will proceed.

Q. During the progress of the construction of Abutment No. 1, you saw Mr. Stevens practically daily, did you not?

A. I saw Mr. Stevens, yes.

Q. Did you at that time in any way suggest to him that it was his obligation to furnish the labor and put up any falsework?

A. That was Mr. Cochrane's position. He was superintendent.

Q. I said, did you do so? A. I did not.

Q. There was no suggestion made by you personally to Mr. Stevens as a representative of Soule that they were obligated to place or furnish the labor to place the falsework?

A. Not on Abutment 1. [105]

Q. At the completion of the job, I mean of Abutment 1, did you render any bill or statement to Stevens that Soule was obligated to pay for the cost, the labor cost on that abutment? A. No.

Q. When it was finally turned over to the Government and accepted, did you in any way notify Stevens or any other representative of Soule Steel

(Testimony of Loren Hunt.)

Company that there was a charge against them for labor or materials furnished in Abutment 1?

A. What date were you referring to?

Q. I am saying July. A. 1940? No.

Q. You say you received a letter from Mr. Lawton sometime in October. Who is Mr. Lawton?

A. Mr. Lawton was the President of Union Paving Company at the time.

Mr. Moore: I have asked counsel to produce it. They don't seem to have it. I assume secondary evidence may be produced.

Q. What was the substance of that letter, Mr. Hunt?

A. It was just instructing me to charge all falsework of that nature to Account 11.

Q. To Account 11?

A. Yes, reinforcing steel.

Q. Up to that point, not only with regard to Abutment 1, but with regard to these other piers with respect to which a back charge is now attempted to be made, the same is true of all of them: They have all been charged to Pouring concrete under the schedule of charges, and none charged to reinforcing steel, is that correct?

A. It is charged to that other account, yes.

Q. It was charged to that other account, and it was sometime in October—can you fix the date in October? A. No.

Q. Maybe I can refresh your memory. There was a man killed on the boom up there on October 15th, I believe. Was it after his death?

(Testimony of Loren Hunt.)

A. I believe it was right at that time. It might [106] have been before.

Q. Then after that you started changing your method of charging on these piers, is that correct?

A. That is right.

Q. Did you do anything else? I mean did you go back to attempt to reset the charges, if we may term it that, on the work that already taken place? A. Yes.

The Court: It is time to adjourn. We will take an adjournment until two o'clock.

(A recess was here taken until 2:00 o'clock p. m.) [107]

Afternoon Session

2:00 O'clock P. M.

Mr. Moore: With your Honor's permission, due to the fact that he has to return, I would like to put Colonel Mahon on out of order, and tie his testimony up later. It will be very short.

The Court: Very well.

ROSS L. MAHON,

called as a witness for Plaintiff; sworn.

The Clerk: Q. Will you state your name?

A. Ross L. Mahon.

(Testimony of Ross L. Mahon.)

Direct Examination

By Mr. Moore:

Q. You are at present a Lieutenant Colonel in the United States Army, are you?

A. That is correct.

Q. In 1939, in the latter part of the year, were you employed by the Soule Steel Company?

A. I was.

Q. You are an engineer, are you, Colonel?

A. Yes, sir.

Q. In what capacity were you employed?

A. Sales engineer for the Soule Steel Company.

Q. In that connection did you have various conferences or meet with Mr. Dowling or other officials of the Union Paving Company?

A. On several occasions, yes.

Q. Directing your attention to the month of October, 1939, were you present at a conference between Mr. Soule and Mr. Dowling?

Mr. Wrigley: Just a second, please. I want to object to this as irrelevant, incompetent and immaterial. The parties in this case entered into a formal written contract as of January 6, 1940 that superseded all prior negotiations, discussions, offers and everything else, and anything they may have agreed [108] prior to that date was carried into that contract and cannot be admissible under the California Civil Code, Section 1625.

Mr. Moore: I did not want to argue that, if I could take this statement from the Colonel at this

(Testimony of Ross L. Mahon.)

time. It will be very short, and then we can argue it later.

The Court: I will allow it subject to a motion to strike.

The Witness: Will you ask the question again?

(The reporter read the question.)

A. To the best of my recollection, on October 4th, the day before the bid opening, I went up by airplane at noon to Sacramento, where the bids were to be opened, engaged rooms for myself and Mr. Soule and one of our other men, and spent the afternoon in ascertaining what possible contractors had representatives in Sacramento.

Mr. Wrigley: May it please the Court, to save time, may it be understood that my objection goes to the entire line of examination without repeating it continuously?

Mr. Moore: It will be so stipulated.

A. After Mr. Soule arrived in town we had occasion to call on Mr. Dowling, or his representatives—my recollection now is that it was Mr. Dowling, himself, we talked to—to find out whether he was going to bid and wanted our price, and we were told that he did.

Mr. Moore: Q. When was that?

A. That was the late afternoon or the early evening of October 4th. As I recall the dates, the bid opening was the 5th, and this was the day before.

Q. Who was present at that meeting?

A. Mr. Soule and myself were there, and Mr.

(Testimony of Ross L. Mahon.)

Dowling, and I think one other. Now, that one other may be Mr. Hunt—I have been away from that place [109] for quite a while, and away from the office—or it may have been one of his other men.

Q. You do not remember who?

A. I don't remember the other one.

Q. Where did the meeting take place?

A. In Mr. Dowling's room, I think.

Q. At the Hotel Senator?

A. At the Hotel Senator, Sacramento.

Q. That was in the late afternoon or early evening. Can you tell us what was said at that meeting?

A. Well, in general, the question was asked whether or not the Union Paving Comapny were going to put in a bid. I had been under the impression, from my previous contact with them in San Francisco that they were going to do so, but nobody admits those things until the last minute.

Q. Regardless of that, what was said in that regard?

A. The question on our part, "Are you going to bid?" And receiving an affirmative reply, "Do you want our bid on the steel?" And my recollection the answer was in the affirmative.

Q. Then what was said, if anything?

A. At that time, I can't say whether we discussed the thing in great detail, but I know in regard to all the other contractors——

Q. Don't go to other contractors.

(Testimony of Ross L. Mahon.)

A. All right, sir.

Q. Do you recollect definitely what was said?

A. Do you want my answer to the best of my recollection?

Q. Yes.

A. To the best of my recollection, we pointed out the difficulty in preparing an intelligent bid unless we knew how far the contractor wanted us to go, and, to the best of my recollection, Mr. Dowling stated that he wanted us to include everything connected with the installation of the steel.

Q. What happened after that?

A. We left after telling him we would see him later with our bid. [110]

Q. And did you see him later in the evening?

A. A second call was made later.

Q. Approximately what time was that?

A. I should say at least 10:00 or 11:00 o'clock in the evening, perhaps a little later, and I base that on the fact that Mr. Dowling was in bed at the time.

Q. Was anybody else there besides yourself and Mr. Soule and Mr. Dowling?

A. To the best of my recollection, nobody was in that room when we talked this thing, except Mr. Dowling, Mr. Soule, and myself.

Q. Now, will you relate the conversation as nearly as you recollect it?

A. A bid was presented to Mr. Dowling in which we quoted a price—my recollection is that it was \$33.80 a ton—on the reinforcing steel for this Pit

(Testimony of Ross L. Mahon.)

River Bridge, installed, including, among other things, the cost of the unsupporting structure for same, that being in accordance with his expressed desire previously.

Q. What was his answer to that, if anything?

A. Well, he accepted the bid, and I think he made no reply at the time. I asked him how it looked.

Mr. Wrigley: I ask that that be stricken, "he accepted the bid."

Mr. Moore: That may go out.

The Court: That may go out.

The Witness: What is that?

The Court: I am speaking to counsel.

Mr. Moore: Q. What did Mr. Soule say, if anything, at that time—I don't mean Mr. Soule, I mean Mr. Dowling.

A. I can't quote his words, nor do I recollect exactly what was said, except that there was nothing more to be discussed. As I recall it, the thing was read over. I believe it was some [111] kind of a written bid that was left with him, and pointing out again that the thing was complete as he had asked for it. We did ask him how we stood in price.

Q. What was said to that?

A. Well, the answer was noncommittal. At that stage any answer would not have been——

Mr. Moore: That is all.

Mr. Wrigley: At this time I want to move to

(Testimony of Ross L. Mahon.)

strike out the entire testimony of this witness on the ground that it is an attempt to vary the terms of a written contract which the parties formally entered into at a later date. Section 1625 of our Civil Code of California provides that the execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning matters which preceded or accompanied the execution of the instrument.

The Court: I will allow it to go in so we can have a record on the ground of the witness not being available, and it is all going in subject to your motion to strike and your objection, and I will give both sides an opportunity to examine into the matter fully.

Mr. Wrigley: It places me in the embarrassing position that if the evidence, we will assume, is determined by the Court admissible, then I won't have an opportunity, after the Court rules on it, to cross-examine this witness.

The Court: You can cross-examine him.

Mr. Wrigley: It would invalidate the objection.

The Court: Not necessarily: if I strike it out, it will all go out.

Cross-Examination

By Mr. Wrigley:

Q. Now, you fix that date as being in Sacra-
[112] mento on what date?

A. I believe I stated, to the best of my recollection, October 4th.

(Testimony of Ross L. Mahon.)

Q. Do you remember the day of the week?

A. No, I do not.

Q. Do you remember whether the bids had gone in yet to the Federal Government?

A. You mean the contractors' bids?

Q. Mr. Dowling's or Union Paving Company's bid.

A. We don't know when the bids go in. We know when they are opened by the Government. They were opened the next morning.

Q. Then, according to your recollection, the bids were opened on October 5, 1939?

A. That is my recollection.

Q. You stated, I believe, that Soule Steel Company made some kind of an offer or bid to Union Paving Company in writing?

A. I believe it was in writing. I don't remember the form. At that time practically all of our bids on a thing of that kind were in writing.

Q. Have you had occasion at any time since then to see a copy of that bid or anything? A. Yes.

Q. In writing?

A. Not in writing, typewritten.

Q. Typewritten copy of a bid of \$33.80?

A. No, the price was not given.

Q. The price wasn't given? A. No.

Q. How recently did you see that?

A. Within the last few days.

Q. What was the date of that bid?

A. I can't tell you what date was on the bid.

(Testimony of Ross L. Mahon.)

Q. Would you recognize a copy of it if you saw it? A. I think I would.

Q. I will show you a writing and ask you if that is the bid.

A. No, that is dated December 11th.

Q. The one that you had was dated what date?

A. Well, around the time of this bidding. [113]

Q. Who had the bid of \$33.80 that you refer to when you saw it last?

A. The bid of \$33.80 was not in writing. It was a verbal bid. Perhaps at the time I translated this bid into this written form.

Q. How recently do you say you saw it?

A. Within the last few days. I say I saw the bid. I didn't see a price in the bid.

Q. Addressed to Union Paving Company?

A. I can't swear to that.

Q. Who had it when you saw it?

A. It was in the files of the Soule Steel Company.

Mr. Wrigley: I would ask that counsel produce that writing.

Mr. Moore: I think that is what he saw (producing a document). He went through the file.

Mr. Wrigley: Q. Is this the writing to which you refer (handing a document to the witness)?

A. That is it.

Q. You notice that that is the original, don't you? A. Yes.

Q. Produced by Soule's office. Is that the original that you saw in the last few days?

(Testimony of Ross L. Mahon.)

A. Let me explain. When those bids are made, they are made up with an original and several copies, and when I handed out the copies used as a bid—you see, instead of being mimeographed this one apparently was typewritten.

Q. I will ask you, was a copy of this bid delivered in any way to Mr. Dowling or any other person on behalf of the Union Paving Company at Sacramento?

A. Well, my recollection is that it was, because in the normal case no man wants to accept a single bid on a thing of that magnitude; something is put out in writing, and the name would have been filled in in the top; perhaps not. You see, that is not addressed to anyone in particular.

Q. I will ask you the question, Do you know whether a copy of this [114] bid was delivered to Mr. Dowling, or any other representative of the Union Paving Company at Sacramento?

A. I said to the best of my recollection, yes.

Q. Who was present when it was delivered?

A. Again, Mr. Dowling, Mr. Soule and myself.

Q. What price was written in here, if any?

A. That I cannot say. I heard the price quoted by Mr. Soule.

Q. After October 4, 1939, did you ever call at the office of Union Paving Company in San Francisco?

A. Several times.

Q. How many times?

A. I can't answer that question definitely. I

(Testimony of Ross L. Mahon.)

would say somewhere between once and three times a week for a period of a few weeks.

Q. Outside of the one occasion on Saturday, October 7th, in company with Mr. Soule, were you ever in Mr. Dowling's office in San Francisco and seen Mr. Dowling? A. Several times.

Q. How many times did you see him?

A. I said before I can't say exactly how many times. I didn't see him every time I called at the office. There were occasions when I was invited to come into his office and occasions when he wasn't there, and I talked to someone else, and I do not think there were many occasions when Mr. Dowling was there that I was not allowed to come in and talk to him.

Q. Did you talk to Mr. Dowling in his office in San Francisco more than the once on Saturday, October 7th? A. Yes.

Q. Who was present?

A. In those other instances, just Mr. Dowling and myself.

Q. In which room down there did those conferences take place?

A. Well, you come in the entry and there was a desk and a gate on the left, as you came in the door, and you go in the gate and turn to the right, go along the wall, and there was a door then [115] to the right which led to Mr. Dowling's office. That is the way I remember getting there.

Q. These were in Mr. Dowling's——

(Testimony of Ross L. Mahon.)

A. Private office.

Q. Private office? A. That is right.

Q. Only you and Mr. Dowling were then present?
A. Yes, on several occasions.

Q. Now, going back to this meeting that you say took place in Mr. Dowling's room at Sacramento, and you fix as being present Mr. Dowling and somebody else on behalf of that company, Mr. Soule and yourself——

A. Are you talking about the first meeting or the second?

Q. The first meeting that you testified those four were present at. What was said about the bids of other contractors on the reinforcing steel?

A. Frankly, I do not recall any discussion of that. First of all, it was too early in the game for us to hope to get any information as to what someone else was doing.

Q. The bids were going to be opened the next day, weren't they? A. Right.

Q. Mr. Dowling's bid of the Union Paving Company was already in, wasn't it?

A. No, not as far as I knew. Those bids normally do not go in until the last minute. Many of them do not go in until the next morning. They are opened at the same time.

Q. Did Mr. Dowling say something in your presence about other bids that he had from other contractors to erect that reinforcing steel and do the welding?

(Testimony of Ross L. Mahon.)

A. You say, "anything about—" can you explain that a little more so I will be sure to give you the right answer?

Q. I cannot give you the answer.

A. I am not asking you for the answer—

Q. Did he say anything about the other bids?

A. Did he say any- [116] thing?

Q. Yes.

A. The only thing he might have asked us—

The Court: Not what he might have asked you.

A. I can't answer the question. I don't remember.

Mr. Wrigley: Q. Didn't Mr. Dowling say to Mr. Soule in your presence that he had other contractors who were submitting and had submitted figures for doing the welding and erecting the reinforcing steel at that time?

A. He may have said that. We took that for granted.

Q. Didn't he actually tell you that he had other bids? A. He may have. I can't say.

Q. Didn't he also tell you the prices that others had bid?

A. He may have also done that, but that would have been accepted, as we might say, with a grain of salt, because actually that does not mean a great deal.

Q. On that date, or prior thereto, had Soule Steel Company figured out the costs in connection with this work?

(Testimony of Ross L. Mahon.)

A. I believe they had, but I had nothing to do with figuring the cost.

Q. What were your duties at that time?

A. Selling.

Q. In other words, you were selling them the idea of getting the contract, is that the idea?

A. Not necessarily selling an idea. I was working out the selling of the steel, the job.

Q. Well, they were not furnishing any steel on this job, were they?

A. No, but selling the contract for placing the steel.

Q. And you do not know on that date anything about the price or cost?

A. I believe I said to the best of my recollection the price quoted on that day at the second-session was \$33.80 a ton.

Q. Now, that price that you stated, of \$33.80, according to your recollection, was for what work?

A. Well, the work of placing the reinforcing steel and the other things that went with it. [117] I would hesitate to list them in detail from memory, but I know they did include one item, which was the supporting structure for the steel, because that had been discussed on several occasions with other people during the day, and it was something that was very vital in this contract, in the price, in the determination of the price.

Q. And that price of \$33.80 was the combined price, wasn't it, for raising the reinforcing steel,

(Testimony of Ross L. Mahon.)

supporting the reinforcing steel, and welding the reinforcing steel?

A. Well, I can't state as to the welding. The letter I just referred to would bring that to my mind.

Q. Isn't that what they were figuring on at that time? A. I believe it was.

Q. And the \$33.80 included the welding and everything?

A. Could I look at that letter again?

Q. To which letter do you refer?

A. The letter you had me look at a minute ago. My recollection is that it does not include the welding. It is not mentioned in that paragraph. There are two separate items.

Q. What is there in this letter that tells you that the \$33.80 did not include everything?

A. Because that is separated up above—do you see that (indicating)?

Q. Is there anything in this letter or writing but the complete job—welding, reinforcing, the placing of the framework, and everything—and is there any price?

A. Down there is a description of what the placing includes, in the last paragraph on that page.

Q. Yes.

A. And up above you find welding is a separate one from the placing. Do you see that at the top of the letter?

Q. At that time you were figuring on placing the

(Testimony of Ross L. Mahon.)

steel, putting [118] in the supporting framework, and welding it, weren't you?

A. Let me point out something. May I show you something?

Q. I am asking you a question.

A. What was the question, please?

(The record was read by the reporter.)

A. We were figuring on doing the whole job.

Q. Were you at Sacramento when the bids were opened on October 5th? A. Yes.

Q. And at that time didn't you personally know what all the other sub-bidders had bid for this particular work? A. No.

Q. Didn't you know Mr. Murphy's price at that time? A. No.

Q. Didn't you know the price of the Los Angeles concern? A. No.

Q. You did not even inquire as to what the other subcontractors had bid on this work?

A. I inquired, yes.

Q. And weren't they given you?

A. No. If they were given to me I wouldn't have believed them. Let me see that letter again. I want to point out a thing. You will notice that bid item 11 was one price in the contract, in the bids, and bid No. 12 was a separate price. They had to be separate because they were quoted as separate prices by the contractor. The welding, therefore, could not have been in the price, if you will notice that.

(Testimony of Ross L. Mahon.)

Q. There are two separate bid items?

A. That is correct. One was welding, one was the placing.

Q. But is there anything in this letter fixing the price of \$33.80 as the price of anything?

A. When there are separate items in the bids, you have to quote separate prices in making out the separate bid items.

Q. I ask you if there is anything in this writing quoting \$33. as the price of anything?

A. No, no price on it.

Mr. Wrigley: That is all. [119]

Mr. Moore: No questions.

LOREN HUNT,

recalled;

Cross-Examination (resumed)

Mr. Moore: Q. Mr. Hunt, before the recess I asked you if you would look in your record so you could inform us as to this charge for steel that went into Abutment No. 1 in the amount of \$369.18. Have you done so?

A. Yes, I have some invoices showing that. There is one of them—Gerlinger's Foundry, California Zinc.

Q. What items go to make up the \$369?

A. Principally some of that steel.

Q. What was that?

(Testimony of Loren Hunt.)

A. It was that steel—that steel, some welding rod, and some oxyacetylene.

Q. You have the oxyacetylene as a separate item; I would like to know the items that you charge there that constitute the \$369.18 for steel. Read them off.

A. There is 9.95 tons, used mine rails, \$15 a ton, \$149.25.

13,740 pounds second hand assorted steel, that was \$240.

Q. What was that last?

A. 13,740 pounds, second hand assorted steel as selected, \$35 a ton.

Q. That is pretty near seven tons?

A. That is right, but not all of that steel went in there.

Q. I am trying to find out what went in there; that is what I am asking you.

A. I would say a portion went in. I couldn't say definitely how much.

Q. You have already read off there 16 tons, have you not?

A. That is right.

Q. That constituted the steel that went to hold up this cantilever isn't that correct?

A. Yes; I don't say all that steel went in [120] there.

Q. Where did the steel go?

A. There was some steel that went in there for rail.

Q. What rail?

A. Rails that had nothing to do with the steel support.

(Testimony of Loren Hunt.)

Q. How many uprights were there?

A. There appear to be six in this picture.

Q. On the job, how many were there, do you know? A. No.

Q. There weren't over ten, were there?

A. That is approximate.

Q. How much do one of those steel rails weigh?

A. 40 pounds a yard.

Q. Can you tell us how many yards went in there? A. No, I can't.

Q. There wouldn't be over a ton of steel that went in, would there?

A. I believe there was more than a ton of steel.

Q. Would you say more than two tons?

A. I think approximately there were more than two tons.

Q. More than two? A. Yes.

Q. Three? A. No, I don't think so.

Q. About two tons? A. Approximately.

Q. You paid \$15 a ton for it, did you?

A. Yes.

Q. \$30? A. \$30 for the rail.

Q. Why did you charge \$369 then to the Soule Steel people?

A. Abutment 1 was not made up by me, personally, and I assumed those figures were correct.

Q. Who made that up?

A. It was made in the San Francisco office from invoices.

Q. In other words, the figures that you have

(Testimony of Loren Hunt.)

given here on direct examination with respect to Exhibit K, examined by your own counsel, the figures in regard to Abutment 1 were not made up by you, is that correct? A. No. [121]

Q. How about the oxyacetylene welding, \$11.10; was that made up by you?

A. That was sent down to San Francisco as approximately what was used.

Q. Then what was this \$49.50 that you charged to Soule? Did you do that, or——

A. That was taken off the daily summaries in the San Francisco office.

Q. How about the labor, \$2545.40?

A. That was taken from San Francisco.

Q. Then you didn't have anything to do with this charge on Abutment 1, is that correct?

A. Abutment 1 was made in San Francisco.

Q. And your testimony this morning is not the fact, then, that you did make these labor charges, is that correct?

A. Well, they were made more or less under my supervision.

Q. We will come back, then, to the labor. What labor was that \$2545? Was that labor? What was it devoted to? Have you found that during the noon hour?

A. Yes, I found that, and I find that there is an error in that.

Q. What was the error?

A. I checked with the dates directly from the daily summaries and found that some of that labor

(Testimony of Loren Hunt.)

and the dates was charged on dates when I know there were no supports being put up for the reinforcing steel.

Q. You do not know how much that item is in error, then?

A. Well, I rough it out from the dates. It looks like it was \$1200 in error in labor alone.

Q. That would still leave some \$1300 worth of labor. What was that labor used for? What type of construction?

A. It was used for the falsework.

Q. What do you mean by the falsework?

A. Well, at that time we had no distinction between falsework for the steel and for our [122] concrete.

Q. I repeat the question: What do you mean by the falsework?

A. The falsework is the bracing.

Q. Inside the arch?

A. Inside the arch, too.

Q. In other words, as I understand you, this labor charge, then, purports to be for labor in constructing the falsework, the framework which supported the arch, is that correct?

A. That is partially correct.

Q. Where is it incorrect?

A. It is also for supporting the steel in the open, mass portion.

Q. These uprights (indicating)?

A. That is right.

(Testimony of Loren Hunt.)

Q. The ten uprights, is that correct?

A. I couldn't say.

Q. Isn't it a fact that Soule placed that steel in the mass formation through men working under Mr. Stevens?

A. Not to my knowledge.

Q. How much labor was required, in dollars and cents, to place those uprights?

A. I couldn't tell you.

Q. How much was charged for placing the falsework in the arch?

A. The summation is together.

Q. Isn't it a fact that this arch was necessary in order, in its primary purpose, to support the concrete?

A. That was primarily for the arch, yes.

Q. It was necessary for that arch to be put in there in order that the concrete could be poured, was it not?

A. That is right.

Q. You made no charge for the lumber that went in there, but you are making a charge for the labor or portion of the labor, is that correct?

A. There is no charge for the lumber. There was no lumber used in supporting the steel.

Q. The labor was expended in putting that lumber into place, wasn't it?

A. On looking at it this noon, in doing back to the [123] original papers, I find that it was.

Q. These figures in here are then incorrect?

A. For Abutment 1.

Q. When did you make this change in Abutment 1, along sometime in October or November?

(Testimony of Loren Hunt.)

A. Will you repeat that, please?

Q. When did you make the change—the question is a rather mixed one. I will withdraw it. When did you back-charge any of this labor or material on Abutment 1 to Soule or revamp your cost?

A. I would say November through January, 1940 and 1941.

Q. And that was long after Abutment No. 1 had been completed is that correct? A. Yes, sir.

Q. Let us travel along to Abutment No. 1—and, by the way, in checking those figures back on labor, did you discover by any chance that also there was labor included in there that was expended on Abutment 2?

A. No, I don't think so. There might have been at that early stage, but I doubt it.

Q. Wasn't there labor included in there for moving the concrete mixer?

A. On checking over that, you could tell from the records.

Q. Moving along to Abutment No. 2, I will call your attention to Drawing 8 of the Government. That is the detail of abutment 2, is it not?

A. That is right.

Q. Let me ask you, wasn't this particular abutment, when it was placed on the edge of a natural slope with the face of the abutment about 63 feet below the level of the surface of the ground, didn't it have to be excavated to put that abutment in?

A. Yes.

(Testimony of Loren Hunt.)

Q. In other words, they dug a big hole in the ground? A. That is right.

Q. And the side walls were rather sloped so that they would hold, is that correct?

A. That is right.

Mr. Wrigley: Pardon me. Are you now talking about Abutment [124] 1 or Abutment 2?

Mr. Moore: Abutment 2.

Q. I will call attention to the fact that at the bottom of this there were forms put in there for two footings, weren't there?

A. That is right, certain footings. They are indicated here.

Q. And those footings were parallel footings that ran through the base of the abutment, is that correct? A. That is right.

Q. And those were about 29 feet long, 14 feet 6 inches, and 6 feet in depth, is that correct—in other words, these concrete footings?

A. That is right, it indicates that on the plans.

Q. And those were put in by the Union Paving Company, is that correct?

A. The forms were put in.

Q. What was the next step in construction there?

A. The forms were placed and then the reinforcing steel was placed.

Q. You mean the side forms were placed?

A. The side forms—the forms first placed, then the dowels, and then the mat was placed.

Q. There was a steel mat placed at the bottom, was there not?

(Testimony of Loren Hunt.)

A. That is right, indicated here.

Q. Was that in these footings?

A. In these footings indicated right here.

Q. Then above that, about six feet above it, there was a second steel mat put in, is that right?

A. That is correct.

Q. And then the dowelings were run in through the lower mat and up through the upper mat, is that correct?

A. That is right.

Q. How far up above the upper mat did they extend?

A. That looks like it is approximately six feet.

Q. How were those dowels held in place, do you know?

A. They were usually held in place—they rested principally [125] on the mat and they were held longitudinally by, usually, a 2 by 4.

Q. And the placing of the two mats and the putting in of the dowels was done by the Soule Steel?

A. That is right.

Q. Then the next step was the Union Paving Company would pour these footings solid, is that correct?

A. That is right.

Q. Leaving the dowels extending up some five or six feet above the concrete, is that true?

A. That is correct.

Q. Then the U. P. would build the outside forms, would they not?

The Court: Will you read that question?

(Question read.)

(Testimony of Loren Hunt.)

The Court: That is the Union Paving Company.

Mr. Moore: The Union Paving Company—pardon me—I have got in the habit of referring to it in that way.

Q. How high were those built, do you know?

A. No, I couldn't tell you exactly the exact height.

Q. The forms run up 30 or 35 feet, don't they, somewhere in that neighborhood, the first forms?

A. The first forms, no, because we had to stop in here at these beams.

Q. You do not know how far up the forms were?

A. No.

Q. How were those forms supported, do you know?

A. They rested right down on the bottom, on top of these footings.

Q. How were they held on the side?

A. Braces.

Q. Braces running out to the side walls held them, is that correct? A. Yes.

Q. Then how did Soule proceed? Would he put in the reinforcing steel, then?

A. He would put in the reinforcing steel then.

Q. How would that be held in place

A. It was usually leaned up against the form.

[126]

Q. The outside form conformed to the Engineers' or Government specifications to where the outside of the abutment would be, is that correct?

A. That is right.

(Testimony of Loren Hunt.)

Q. And then the steel was inside the outside form but supported in some manner against the outside form, is that correct? A. That is right.

The Court: Q. Do you know how it was supported?

A. These bars were vertical, with the exception of these (indicating), and they were braced in against the side, and to be definite—I don't know whether they would have dough balls.

Q. Then you had a sort of trestle coming over from the hoist that was alongside Abutment 1, had you not? A. Yes.

Q. The concrete would be hoisted up in the hoist alongside of Abutment 1 and run over in cars to Abutment 2, is that correct? A. That is right.

Q. Into some sort of hopper or something of that sort? A. That is right.

Q. And then through the means of elephant trunks, it would be poured, and it would be poured up to near the top of the forms, and then I assume the forms would be extended higher into the air and braced? A. Yes.

Q. And then Soule, as steel was required, would additional steel so it could be held, and it would be held against the outside forms, is that correct?

A. That is right.

Mr. Moore: I will offer this and ask to have it be marked with an appropriate number.

The Court: What about this one?

Mr. Moore: That has been marked your Honor.

(Testimony of Loren Hunt.)

(The document was received in evidence and marked "Plaintiff's Exhibit 17.") [127]

Mr. Moore: Q. Let us take the construction of Pier 1 for a moment. On the base of Pier 1, that was an uneven base, was it not, one portion of the base being lower than the other, is that correct?

A. What actually happened was that the ground at this elevation was unstable and we had to extend the depth down I think approximately 10 feet, not more than 10 feet.

Q. Deeper than these plans?

A. Than these plans show.

Q. After you had gotten to a base what was done? What was the first step in construction?

A. The first step was to build the supports up.

Q. What supports?

A. Support the reinforcing steel.

Mr. Moore: Just a minute. I will ask that that answer go out.

Q. Just describe the supports that you are referring to.

A. In Pier 1 we used angle iron, vertical angle iron to support both the reinforcing steel and the runways.

Q. Is that the type of construction that you described this morning, or practically the same as these railroad irons or angle irons in a vertical position?

A. That is right.

Q. Isn't it a fact that the first thing that was

(Testimony of Loren Hunt.)

done was the mat at the bottom would be put in by Soule, was it not, on sills, or something of that sort, a steel mat? A. In some cases, yes.

Q. And then this interior framework would be put in, is that correct? A. Not in all cases, no.

Q. I will come to Pier 3, but that is what would be done if it was not put in?

A. That is right, if it was not put in they would put that mat in first.

Q. They would put that mat in first, and then these steel up- [128] rights would be erected. By the way, the original plans called for 10 by 10 timbers as uprights, is that correct?

A. That is what our general idea was before we got on the site.

Mr. Wrigley: You say the original plan. What plan do you refer to?

Mr. Moore: The original plan of construction of this interior framework.

The Witness: That is at the base.

Mr. Wrigley: You do not refer to the Government plans.

Mr. Moore: No.

The Witness: No.

Mr. Moore: Q. I am talking about the Union Paving Company's plan. And that would require that as the pouring of the concrete progressed, these 10 by 10 timbers would have to be pulled out, leaving a void which would have to be poured with concrete, is that correct? A. That is right.

(Testimony of Loren Hunt.)

Q. And the plan was subsequently changed, and the plan that was actually used was putting in these old railroad irons or angle irons which the Government would permit to remain in this mat without the necessity of pulling them, is that correct?

A. That is correct.

Q. And then on these, in the manner in which you described, there would be built a platform, would there not?

A. Yes, these are in the bases.

Q. In the bases, and how far above the bottom or base line would the first platform be built?

A. Do you mean to say our intention was to build a platform——

Q. No, I am asking you wasn't there a platform actually built?

A. Yes, there was a platform built.

Q. How far above the base of Pier 1?

A. I couldn't say. [129]

Q. Well, you said something in your previous examination about anything from 10 to 20 foot lifts; that is what you said.

A. Yes, but it varied. I couldn't specifically point how high it was in Pier 1.

Q. It would be somewhere between 10 to 20 feet above the base, would it not?

A. That is right.

Q. And these angle irons and subsequently railroad irons would be how high?

A. The rail was 30 feet.

(Testimony of Loren Hunt.)

Q. In other words, the irons would stick up 30 feet, is that correct? A. That is right.

Q. And some 10 or 20 feet from the bottom of them there was a platform built, was there not?

A. There was internal bracing.

Q. Internal bracing which you have described here with the 6 by 6's and the 2 by 6's, is that correct? A. That is right.

Q. In addition, there was a platform that was 10 to 20 feet above the base?

A. There was a platform built at the pouring level.

Q. From Abutment 1—that is, where the hoist is, where the concrete went up on the hoist—it came down and it was run over this trestle work, past Abutment 2, to Pier 1, is that correct?

A. That is right.

Q. That runway, if you want to call it that, or trestle, the top of it was level with what portion of the pier when completed?

A. The top trestle was level with the top.

Q. In other words, as the cars or buggies would come across from the hoist, they would come on Pier 1 at a point that was at the top——

A. Approximately the top, yes.

Q. Of Pier 1, is that correct?

A. That is correct.

Q. How high was that pier?

A. It is indicated on the plans. It is 92 feet 6 inches from the bottom. [130]

(Testimony of Loren Hunt.)

Q. How was that trestle work supported 92 feet and 6 inches above the base of the piers?

A. Usually by 6 by 6's.

Q. That was built up there?

A. That was built up.

Q. And supported, and when the cars or buggies came across filled with concrete, what happened to them? Were they dumped in a hopper?

A. Dumped into an elephant trunk and down to another hopper.

Q. The other hopper would be where? We are pouring the base now.

A. Down at a lower level, at a level where we could pour from.

Q. That would be your pouring level, is that correct, and through that elephant trunk it would come down in this hopper?

A. That is right.

Q. And be emptied into buggies?

A. That is right.

Q. These buggies would run around on this platform? A. That is right.

Q. And they would be dumped in to fill the concrete in the base? A. That is right.

Q. We will just assume that the first pour was 10 feet, or the lift was 10 feet above the base. When you got to that or close to that point, the platform would be moved up another segment or section, is that correct?

A. It depends upon how far we could drop the concrete.

(Testimony of Loren Hunt.)

Q. I mean the lift would be raised. This platform would be removed, and using the old timbers, or perhaps part of them were replaced, a similar platform would be built 10, 15 or 20 feet above whatever the distance was? A. Yes.

Q. How high was this reinforcing steel? How far did it stick up from the base?

A. The plans indicate that the building steel was up maybe 20 feet before it was welded. [131]

Q. What is that?

A. 20 feet before it was welded. There is an indication of a weld here.

Q. When you came to 20 feet with your pouring or closer to 20 feet, you would stop pouring, wouldn't you? A. Yes.

Q. And additional pieces of reinforcing steel having been placed, they would be welded at that point, wouldn't they? A. That is right.

Q. And meanwhile this structure that you have referred to—you say it was 35—those rails were 35 feet in height? A. 30 feet.

Q. It would be sticking up 10 feet; you would have 10 feet more rails when you had done that, is that correct? And that would be built up, though, and the reinforcing steel would be raised against that, is that correct? A. That is right.

Q. And then you would proceed with the same process? A. That is right.

Q. In other words, this interior framework that you are referring to was used for two purposes, was it not? A. That is correct.

(Testimony of Loren Hunt.)

Q. For the pouring of the concrete and also for supporting the reinforcing steel, is that correct?

A. That is correct.

Q. Now, that same type of construction was followed in Piers 3 and 4, was it not?

A. That is right, 2, 3, and 4, right on up through to 7.

Q. In making up these charges, where the steel was held against the inside framework, you have charged the entire framework to the Soule Steel Company, is that?

A. That is my—

Q. And in regard to the abutments—and we will eliminate Abutment 1—and the other piers supported by the outside forms, you did not charge it, is that correct?

A. That is [132] correct.

Q. You drew a distinction between whether it was supported on the inside framework or whether it was supported on the outside forms, is that correct?

A. The distinction can be stated a little differently, but that is all right.

Q. That is the fact?

A. That is right.

Q. That is the distinctive fact.

The Court: Q. You state the distinction in your own words.

A. The distinction is that the 2-inch bars are practically the only thing that seem to be in dispute.

Mr. Moore: I beg your pardon. It is disputed all the way through.

(Testimony of Loren Hunt.)

The Witness: Well, the 2-inch bars are the heaviest bars, and they lean in on this falsework, and Piers 8, 9 and 10 and Abutments 2, 3, and 4 are a lighter steel, and the steel is more or less vertical, and the weight of the steel is inconsequential to the weight of the concrete that it was necessary to support.

Mr. Moore: Q. Who told you to charge 100 per cent of this interior construction to Soule?

A. That was the instructions that I had from the San Francisco office.

Q. In other words, the explanation that you have given is merely your own idea, but you do not know why they ordered you to do that?

A. That is my idea, yes.

Q. On all of these piers, regardless whether the steel was attached to the outside or whether it was supported by the inside framework, up until October, wasn't all of your labor charged the same on all of them?

A. Will you elaborate on that?

Q. What I mean is, wasn't all labor and materials——

A. Charged to a general account—yes. [133]

Q. Charged under this chart of accounts to the abutment, to the concrete in the abutment, the concrete in the piers—the concrete in the abutment No. 7, the concrete in the Pier No. 8, Piers Nos. 1 and 7, above the top of the base No. 9, and Piers 8, 9 and 10—No. 10? Wasn't all your labor and material

(Testimony of Loren Hunt.)

charged that is now in dispute to items 7, 8, 9 and 10? A. Yes.

Q. Labor and materials, is that correct?

A. Yes, sir.

Q. No charge was made to Item No. 11, reinforcing steel? A. No.

Q. And those charges that you have referred to, up until sometime in October, as I understand you, were made under instructions given to you at the beginning of the job by Mr. Dowling, is that correct?

A. It was worked out by Mr. Dowling, and Mr. Cochrane, and myself.

Q. Then subsequently, sometime in October, you received instructions from the San Francisco office to change your method of charging?

A. Yes, I found the note (handing a document to Mr. Moore).

Q. Your attorney, here, has produced a note of October 12th, 1940. Is that the note that you were referring to?

A. That is the note I was referring to.

Mr. Moore: I will offer this in evidence. It reads, "October 12, 1940, L. W. Hunt, Pit River.

"Referring to our notice September 23, 1940 in relation to our employees working for Soule Steel Company, the information submitted in connection with this matter leaves us quite uncertain as to definite conditions. We would appreciate separate summation of each abutment

(Testimony of Loren Hunt.)

and pier with detailed charges for each at your earliest conven- [134] ience.

“A. LAWTON.”

(The document was received in evidence and marked “Plaintiff’s Exhibit 18.”)

Mr. Moore: Q. After you received that, did you receive any further instructions as to what you should do? A. Yes.

Q. What were those?

A. To go back through the records—first, to continue and distinguish between internal falsework as we progressed, and that was set up, and we had three shifts of timekeepers eventually set up, and I think the first date was about the end of October when that was carried and put in effect.

The Court: We will take a recess for just a few minutes.

(Recess.)

Mr. Moore: Q. Mr. Hunt, I asked you, or the defendants in this case, to produce certain records. I will hand you a folder and ask you what that is, if you recognize it.

A. These are charges that were used as the basis for our charges to Soule Steel.

Q. In other words, these are your computations, are they? A. Yes.

Q. And these were made up by you at about what date? A. Some of these are dated.

Q. Will you refer to them and tell us the dates—

A. Well, November 30, 1940.

(Testimony of Loren Hunt.)

Q. What did that cover?

A. That covered piers—November 28th—summary of materials that went into the construction of the steel supports and falsework of Piers 2, 3, 4, 5, and 6 up to the time we started to take an accurate account of the materials used. [135]

Q. What you just read is a letter signed by you and addressed to the Union Paving Company?

A. Union Paving Company, San Francisco.

Q. In other words, you went back over the records which had previously been charged to pouring concrete and took those figures from them?

A. Yes, and also a print we made up of the typical sketch—a typical sketch of the typical layout.

Q. After taking this out of the other charges, these are included in the bill that is now rendered against Soule?

A. That is right.

Q. Will you tell us the next date?

A. January 14, 1941.

Q. That is a letter by yourself to the home office, is it?

A. Yes: "Enclosed is a summary of the materials that went into the construction of the steel supports and falsework for Piers 1 and 7."

Q. That was compiled in the same manner, was it?

A. In the same manner, yes.

Q. Are there any later ones?

A. The later ones are weekly summaries of materials used. The next one is for the week ending November 2nd.

(Testimony of Loren Hunt.)

Q. That was after you had changed your method of cost accounting, is that correct? A. Yes.

Q. Where you were charging it direct to Soule?

A. That is right.

Q. And those that came after that—

A. Those that came after that are in the same vein—the week ending January 11th—and there is some labor included in here, too; here is a typical one. Period March 1st to March 31st, taken *direction* from the daily summaries.

Mr. Moore: We will offer this, your Honor, with an appropriate number. [136]

(The document was received in evidence and marked "Plaintiff's Exhibit 19.")

Mr. Moore: Q. Referring to your daily summary, there has been one introduced here with relation to— A. That is Pier 4.

Q. Does it appear on your daily summary where labor is charged and to what item?

A. Yes, here is falsework, Pier 4. Now, these are made up by different timekeepers. We had a three-shift operation there, and we had one timekeeper on each shift.

Q. Now, those are daily time sheets. Does that show the account number in any of the bills?

A. Right there, 8/3 and 9/3.

Q. In other words, even on your daily time sheets up to November labor was charged to placing concrete and not to steel, is that correct?

A. It was charged under that operation of falsework, yes. You are right.

(Testimony of Loren Hunt.)

Q. Every record, cost sheets or records of any other type up to that date, appeared in this manner? A. That is right.

Q. And no charge made to Soule at all?

A. No charge.

Q. With regard to this interior framework that you referred to, it was essential to the pouring of the concrete in those piers, was it not?

A. Yes.

Q. And was used for that purpose?

A. Could I enlarge upon that?

Q. Yes, but will you answer the question?

A. Yes.

Q. It was used for that purpose? A. Yes.

Q. Go ahead.

A. Well, it was used for both, for placing the steel first and then the runway second.

Q. It was used for both purposes; it was used in the pouring of the concrete, was it not?

A. Yes.

Q. And there was no other method at that place or way in which that concrete could be poured, was there?

A. There were other [137] methods, but that was the method we used.

Q. And those were erected by the Union Paving Company, were they not?

A. They were erected by the Union Paving Company.

Q. And by labor paid by the Union Paving Company? A. Yes.

(Testimony of Loren Hunt.)

Q. And the materials that went into it were paid by the Union Paving Company?

A. Yes.

Q. To your knowledge, or did you, rather, ever confer with Mr. Stevens or any official of the Soule Steel Company as to how this should be constructed, that interior framework?

A. That was not my department; that was the superintendent's department.

Q. But you—— A. I did not.

Q. You did not. Did you ever, yourself, confer with them as to where the materials should be purchased, or what price should be paid for them?

A. No.

Q. Did you ever, yourself, confer with them as to the labor that was to be used—I mean the individual laboring man?

A. No, that was—I did not, and I maintain that that is the superintendent's job.

Q. I am asking you about yourself.

A. No, I did not. I had nothing to do with that.

Q. In other words, so far as you, yourself, were concerned, you were in charge of all the cost accounting, cost records on the job, were you not?

A. Cost—office manager.

Q. You were the office manager-engineer on the job, is that correct? A. Yes.

Q. And you, yourself, as such office manager, never had a conference with any representative of

(Testimony of Loren Hunt.)

the Soule Steel Company along the lines I have just referred to?

A. I never entered any conference. I was present at a few. [138]

Q. That was after October 15th, though—none before? A. I can't name any date.

Mr. Moore: I think that is all of this witness. Just a moment, please. There is one question I overlooked.

Q. When was it that you finally got your cost records revamped and performed this labor that is in the exhibit?

Mr. Wrigley: I didn't understand that question.

Mr. Moore: I didn't finish it. I am looking for an exhibit. Will you read the question, Mr. Reporter?

(Question read.)

Mr. Moore (continuing): Labor and material that is in Exhibit 19—when was that job finished?

A. The last entry is as of May 31, 1941.

Q. And the compilation which I understand was prepared by you or from your notes, Defendants' Exhibit K, when was that finally compiled, do you know? A. No, I couldn't say.

Q. Was that prepared by the home office?

A. That was compiled, I believe, by the home office.

Q. You had nothing to do with the compiling, other than furnishing whatever information——

A. I furnished the information.

Mr. Moore: I think that is all.

(Testimony of Loren Hunt.)

Redirect Examination

Mr. Wrigley: Q. Mr. Hunt, your instructions, generally speaking, with reference to your duties and functions up there, came from the San Francisco office, did they not?

A. They came principally from the San Francisco office.

Q. And usually there was some time elapsed between your records getting into the San Francisco office and being checked over here and you being issued instructions there?

A. Pardon me. I didn't catch that. [139]

(Question read.)

A. Yes, there was a time allowance to get any change in operation.

Q. The exhibit which has been marked Plaintiff's Exhibit No. 18, October 12th, was that received by you before the accident or after the accident?

A. Well, mail usually took overnight, and so we probably got it about the 14th of October.

The Court: Q. What was the date of the accident?

A. The date of the accident was October 15th.

Mr. Wrigley: Q. In other words, the facts that led to this memorandum were all prior to the accident? A. Yes.

Mr. Moore: He did not know what led to it. I think the question is improper.

(Testimony of Loren Hunt.)

Mr. Wrigley: Is that supposed to be an objection to the question or a statement?

Mr. Moore: The question was asked and answered before I could object to it. I will withdraw the objection.

Mr. Wrigley: Q. Now, Mr. Hunt, Mr. Moore asked you if you at any time sent any bills to Soule Steel Company for this interior falsework. Were any bills for anything sent to anybody out of your office up at Pit River?

A. All billing was done from the San Francisco office.

Q. And no billing was done from up there?

A. No billing, no.

Q. Do you, of your own knowledge, know what billing came out of the San Francisco office?

A. No. May I make a correction to that?

Q. Yes.

A. Occasionally we rented some equipment to some other contractors that are located up there, and when they came in to offer to pay for it, I took their money and presented them with a paid receipt. No billing went out of that office. [140]

Q. All equipment had a fixed rental price, didn't it?

A. That is right.

Q. Mr. Moore asked you if it was not a fact that the original plan as devised for holding up this steel and so on——

Mr. Moore: Holding up what?

Mr. Wrigley: Holding up the reinforcing steel.

(Testimony of Loren Hunt.)

Mr. Moore: I am going to object to that because it is contrary to his testimony now. His testimony is that was used for two purposes. I think the question is improper. It assumes facts that are not in evidence, your Honor, and contrary to the evidence.

Mr. Wrigley: Would the reporter read, because Mr. Moore interrupted before and now he objects to my asking the very thing that he says there.

(Question read.)

Mr. Wrigley: The steel, whatever it is used for, the original——

Mr. Moore: When you put that “and so on” in there——

Mr. Wrigley: No, it is there. The reporter has it down.

The Court: Proceed.

Mr. Wrigley: Q. (Continuing): ——calls for the use of 10 by 10 wood uprights, that is a fact, is it not?

A. That was in the base. That is a fact—bases.

Q. Later that was changed so that you used steel rails or angle iron in place of 10 by 10?

A. That is right.

Q. Did the use of rails or angle iron reduce the cost or increase the cost?

A. It decreased the cost.

Q. Now, you were asked about the trestle that was built from your concrete mixer at the location from which you poured Abutment 1, Abut-

(Testimony of Loren Hunt.)

ment 2, and Pier 1. Was any of the cost of [141] that trestle charged in your tabulation against Soule Steel Company?

A. That trestle did not include Abutment 1. It included just Abutment 2 and Pier 1. No, that cost was not in.

Q. Was any of the cost on any of the piers or abutments charged to Soule Steel Company where that reinforcing steel was held up by the use of your exterior forms?

A. No, with the exception of Abutment 1, and that is in error.

Q. Mr. Moore was asking you about the order in which this work was done, and your answer would give the impression that they would put up the steel and then they would stop and go no further until you had poured the concrete. Now, isn't it a fact that all this work was going on consecutively and that the reinforcing steel was always away ahead of the welding, and the welding was ahead of the pouring of the concrete?

A. That is right.

Q. With reference to this so-called summary, starting first in November, Plaintiff's Exhibit 19, those blue sheets, do you have in mind the figures as shown in this tabulation?

A. Yes.

Q. Are those the same identical figures that went in to make up the figures used in Defendants' Exhibit K, or is there a variance?

A. There appears to be a variance of 3 cents.

(Testimony of Loren Hunt.)

Q. Now, assuming that that inside form work was not there first to hold up the reinforcing steel——

Mr. Moore: I am going to object to that; it was not first to hold up. It was for two purposes. I object to the question as leading, your Honor, his own witness.

The Court: You may omit the “first”.

Mr. Wrigley: Q. Assuming that the steel rails, the 6 by 6 cross pieces, and the 2 by 6 girders were not there at the time that you were ready to pour your concrete, would it have been necessary to have that type or that expensive construction [142] in order to pour the concrete?

Mr. Moore: I am going to object again. We have an expensive construction, your Honor. It certainly is leading to the highest degree.

The Court: That is a good argument. It has no place in the evidence. The form of your question is objectionable. Sustained.

Mr. Wrigley: Q. Were the use of steel rails for uprights such as were used on the various piers there necessary in order to build your form work or framework to pour your concrete?

A. It was not necessary for the forms.

Mr. Moore: Q. It was not necessary what?

A. It was not necessary for the forms.

Mr. Wrigley: Q. Did the interior falsework or framework in any way support or hold up your exterior concrete forms? A. No.

(Testimony of Loren Hunt.)

Q. How were they held in place?

A. They were held in place by the bolts attached directly to the concrete already in place.

Q. In other words, as I understand the fact, the concrete forms outside were supported by those bolts which ran to the poured or finished concrete inside?

A. Yes; in other cases these bolts were completely through the pier.

Q. And did not in any way attach themselves or were not fixed to the interior falsework or framework?

A. That is right.

Q. Were the 6 by 6 girders necessary in order to pour the concrete?

A. The system we used, they were used as such.

Q. They were used, but if they were not already there, was it necessary in order to pour the concrete?

Mr. Moore: I do not understand your question. It sounds to me like it is highly argumentative and leading, your Honor, [143] in light of the witness' answer that they were used.

The Court: The ultimate fact is they were used.

Mr. Wrigley: The fact is they were used, as I understand, because they were there.

The Court: Who brought them there?

Mr. Wrigley: They were put there to hold up the reinforcing steel.

The Court: By whom?

(Testimony of Loren Hunt.)

Mr. Wrigley: You mean put there by whom?

The Court: The timbers you are talking about.

Mr. Wrigley: They were put there by the Union Paving Company.

The Court: Very well.

Mr. Wrigley: Q. Did you, prior to this method, devise a plan for your use in pouring the concrete without those inside rails, inside girders, and the 6 by 6 girders, and the 2 by 6 cross pieces?

A. We had a system devised where those braces were unnecessary.

Q. When you say those braces were unnecessary, what part of the structure do you refer to?

A. The 2 by 6's.

Q. Were the 6 by 6's necessary on your plan?

A. They were.

Mr. Moore: Just a minute. You say his plan. Did he draw a plan?

The Court: In any event, he said they were necessary.

Mr. Wrigley: Q. In response to counsel's question, did you personally prepare this plan for pouring the concrete that you referred to?

A. We drew up a plan, yes, sir.

Q. You say "we"——

A. I drew up a plan.

Q. And in that plan you say these 2 by 6 braces were not necessary?

A. No. [144]

Q. Was any other part of the structure necessary?

(Testimony of Loren Hunt.)

A. We had to have vertical supports for this.

Q. Was it necessary to build a framework running up into the air, 60 feet ahead of your work, in order to pour the concrete?

A. No, it was never necessary for that.

Q. How far ahead of your work of pouring concrete was it necessary to build forms in order to pour concrete?

A. Just had to have that platform just above the forms.

Q. What do you mean by "just above the forms"?

A. If the forms was 12 feet, we had to have our platform one foot higher so we could get underneath and finish. It was not necessary to build it up 60 feet.

Mr. Wrigley: I think that is all.

Recross-Examination

By Mr. Moore:

Q. You say it was not necessary to build ahead 60 feet. Nevertheless, the fact remains, does it not, eventually you had to build that framework clear up to the top of the pier?

A. That is right, but it is far more expensive to build a 60-foot tower than a 10-foot tower.

Mr. Moore: I will ask that the answer go out as not responsive. I do not want to get into the question of expense on that.

Q. You have to use the timbers just the same, don't you?

(Testimony of Loren Hunt.)

A. It is not necessary to have so many braces, sway braces.

Q. Wasn't this steel also supported from outside support put up by Mr. Stevens?

A. When you say "this steel,"——

Q. I mean the reinforcing steel.

A. In some cases it was.

Q. And you had to build this interior framework all the way to the top in order to pour the concrete, did you not?

A. That is right. [145]

Q. You say the way it was built up, it was somewhat more expensive, is that correct?

A. That is right.

Q. And so, therefore, you charged 100 per cent. cost to Soule; that is correct, isn't it?

A. That is correct.

Mr. Moore: That is all.

J. A. DOWLING,

called as a witness on behalf of defendants; sworn.

The Clerk: Q. Will you state your name?

A. J. A. Dowling.

Direct Examination

By Mr. Wrigley:

Q. With reference to the period in question, starting in October of 1939 and up to the comple-

(Testimony of J. A. Dowling.)

tion of the job, were you connected with the Union Paving Company? A. I was.

Q. In what capacity? A. Manager.

Q. You were such on October 4, 1939 and October 5th, when the bids were opened?

A. I was.

Q. You heard the testimony of Mr. Mahon, I believe it was? A. Yes, sir.

Q. As to a conference held in your room at the Hotel Senator, Sacramento, on October 4th?

A. Yes, sir.

Q. Who was present at that conference, according to your recollection?

A. It was no conference. Knocked on the door about ten o'clock at night, and Mr. Soule wanted to talk about the job. No price was given, whatsoever.

Q. Did they at that time submit any writing or bid or price for this steel work?

A. They did not.

Q. Now, after the contract was entered into on January 6th, 1940, did you have any conferences on the job with Mr. Soule that you remember?

A. After? [146]

Q. After the contract was let on January 6th.

A. Yes. He and I went up on the job on, I think, the 20th of December.

Q. The 20th of what?

A. 20th of December.

Q. No, I say after the contract was let on January 6, 1940—— A. Yes.

(Testimony of J. A. Dowling.)

Q. Did you meet him on the job?

A. No. The only thing we did do, we went up there together on the 20th of December, and, as I understand it, that was his first time on the job, the jobsite.

Q. After January 6th was he ever on the job with you at any time?

A. I can't place him there at any time. He might have been there once, but that is the only time he might have been there.

Q. You haven't any recollection of any discussion or meeting him on the job after January 6th?

A. No.

Q. Did you meet Mr. Stevens on the job after January 6, 1940? A. Quite frequently.

Q. How much of the time, extending, we will say, from January 6, 1940, until midsummer of 1941, how often did you go up there?

A. Quite often.

Q. What do you mean by "quite often"?

A. Usually once a week, once in ten days.

Q. And would stay how long, on an average?

A. Stay there from one day to a week or ten days at a time.

Q. Did you have any discussion with Mr. Stevens with reference to the interior framework or falsework on these piers? A. I did.

Q. Approximately when did the first discussion come up?

A. Well, the first discussion came up along about in July.

(Testimony of J. A. Dowling.)

Q. Of what year?

A. Of 1940, early in July.

Q. Where did that discussion take place?

A. On the jobsite.

Q. When you refer to the jobsite you mean——

A. Where the work was under progress. [147]

Q. Where the work was going on?

A. Yes.

Q. Who was present, as you remember it, at this first discussion?

A. I don't recall who was present.

Q. Other than yourself and Mr. Stevens.

A. Other than myself—Mr. Hunt might have been, or Mr. Morrisett.

Q. Give us in substance what you said and what he said at that first conference with reference to the interior falsework or framework?

A. I asked him to sit down with us and adjust or come to some agreement of how the charges for the interior structure should be apportioned. He said he would take it up with San Francisco. Nothing happened until along about in September, again.

Q. Of the same year?

A. The same year. The same thing happened with no results. So I told him we would pay no more money for that work until such time as we could get a settlement or some adjustment of some type.

Q. Did you have more than the two discussions with Mr. Stevens with reference to the cost of this interior falsework and the framework?

(Testimony of J. A. Dowling.)

A. That was all. The job went along. We did not pay, then, from July until, oh, I guess it was December, 1940, tried to hold back enough to cover their share of the cost of the work, or what we thought it should be.

Q. Did you have any discussion as to dividing the cost, or anything like that?

A. No, that is what I wanted to bring to a head, if I could.

Q. Mr. Dowling, Mr. Moore introduced in evidence here an exhibit or writing called Plaintiff's Exhibit 13, addressed, "To Whom it May Concern," saying that final settlement was made on November 3, 1941. You heard that read in evidence, didn't you? A. Yes. [148]

Q. Is that the fact?

A. It is not a fact.

Q. As a matter of fact, they have not made any final settlement yet, have they?

A. That is correct.

Q. As a matter of fact, under your contentions, at least, there is still a large amount of money unpaid to you for work on that job?

A. Yes, sir.

Q. And that matter is still under discussion with the Engineer up there, and they have not rendered a final decision or report on that?

A. It is past them. It is up to the Department of Interior.

Q. There is no filed decision on it?

(Testimony of J. A. Dowling.)

A. No, sir, can't get any reply out of them for a year and a half.

Q. Now, Mr. Nelson, an accountant, came down to your office previous to this trial, went over and checked all your figures in detail? A. He did.

Mr. Moore: He checked some of them, not all of them.

The Witness: He checked all he had time to check, and he asked me some more questions, and I asked him to write a letter. He wrote one letter, and we produced everything required in that letter, and he refused to write the second letter, and we didn't know what to give him.

Q. Mr. Nelson was connected with the firm of Skinner & Hammond? A. Yes, sir.

Q. In other words, you turned over to him all the records apparently that you thought he was asking for in the office? A. Yes, sir.

Q. So he checked these costs, so far as you knew, and after he checked them did he furnish you with a statement of the items that he wanted further data on?

A. For a portion of what he wanted. [149]

Mr. Moore: I haven't any objection, but I do not see what in the world a conversation between him and the accountant would have to do with this case, your Honor.

Mr. Wrigley: Mr. Nelson was turned loose carte blanche in the office. He took a lot of things—in fact, he took a lot of things that we did not know about until to-day. They introduced a photostatic

(Testimony of J. A. Dowling.)

copy of a document that we did not know was out of the office until today.

The Court: Anything that occurred in the office, no third person could be bound by.

Mr. Wrigley: Their man did it.

The Court: Did your man go down there?

Mr. Moore: Why, yes, your Honor. We took photostatic copies. They agreed to have our accountant go in and investigate Mr. Dowling's books.

The Court: What value has it here?

Mr. Moore: I do not know what the purpose of it is.

The Court: Develop the facts, whatever they are.

Mr. Wrigley: Q. Leaving out the penciled notes after Mr. Nelson got through, those are the items that he wanted further information on, aren't they?

A. That is correct.

Mr. Wrigley: We would ask that that be marked Defendants' Exhibit next in order, with the stipulation, of course, that the pencil notations on there were not on there at the time they were made.

Mr. Moore: I would like to know what the purpose of it is, Mr. Wrigley.

Mr. Wrigley: The same purpose as your introducing the tabulations of how they made up their records, which Mr. Nelson took without permission.

[150]

(The document in question was thereupon received in evidence and marked "Defendants' Exhibit V.")

(Testimony of J. A. Dowling.)

Mr. Moore: We didn't take anything we did not have permission to take.

The Court: In any event, all of the original books are here, aren't they? Neither side is bound by what this gentleman did?

Mr. Moore: We put an accountant in to get an investigation of the charges. That is all it amounted to. We were told we could make copies of anything we wanted.

Mr. Wrigley: That is correct.

Mr. Moore: I did not want to come before your Honor and make a motion under the Code, for which the Code provides, that we have the right to take photostatic copies. Mr. Wrigley said, "It is not necessary. Send your accountant in and **make any memorandum or copy you want.**"

Mr. Wrigley: That is correct, but he was told specifically he should not take anything out of that office without getting permission, and he took it out of the office, and we never knew it until to-day.

Mr. Moore: He didn't take anything that he wasn't told down there. I told him to get copies of that—that is all I know—and I got copies.

Mr. Wrigley: Q. And in response to Mr. Nelson's request as contained in that writing, you gave this further memorandum?

A. Yes, that is correct.

Mr. Wrigley: The main purpose of these is to show that these same items they are questioning

(Testimony of J. A. Dowling.)

are identically the same as in the tabulation. We offer this as defendants' exhibit next in order. [151]

(The document was thereupon received in evidence and marked "Defendants' Exhibit W.")

Mr. Wrigley: Q. Now, during the progress of the work, aside from these conversations with Mr. Stevens, did you have any conversations with any other representative of Soule Steel Company with reference to the cost of this interior falsework or framework?

A. No, not until the completion of the job.

Q. After the completion.

Mr. Moore, have you a copy of this (indicating)?

Mr. Moore: The document that Mr. Wrigley is now going to introduce or question the witness in regard to, your Honor, a copy of it was attached to Mr. Dowling's deposition as Plaintiff's Exhibit No. A. I want to make that statement so it can be identified with his deposition.

The Court: Very well.

Mr. Wrigley: I want to state further for the record that this exhibit, here, consists of two pages, one in the form of a letter from the Union Paving Company to me, to which is attached a certain tabulation, and on both the letter and the tabulation there are certain pencil markings or notations, and Mr. Moore's copy is also marked up. I think it should be understood that these pencil markings were not part of the original writing.

(Testimony of J. A. Dowling.)

Mr. Moore: So understood.

Mr. Wrigley: Q. Mr. Dowling, showing you what purports to be letter of September 10, 1941, and an itemized statement, do you recognize those writings? A. Yes.

Q. As a matter of fact, they were sent to me to turn over to Mr. Thelen? A. That is correct.

Q. Who was connected in some capacity, as attorney or otherwise, with Soule Steel Company?

A. Yes, sir. [152]

Mr. Wrigley: Before examining the witness further, if your Honor please, I would like to offer those in evidence.

Mr. Moore: I have no objection.

(The documents were thereupon received in evidence and marked "Defendant's Exhibit X.")

DEFENDANT'S EXHIBIT X

California Street

Phone GARfield 7820

Union Paving

San Francisco,

September 10, 1941

Mr. H. F. Wrigley

Monadnock Building

San Francisco, California

Dear Sir:

The total cost of constructing supports for reinforcing steel, templets, spacers, falsework, runways,

(Testimony of J. A. Dowling.)

etc., for use in building the Piers and Abutments of the Pit River Bridge is as follows:

Chargeable to Union Paving Co:

Runways	\$38,063.93		
Falsework	13,575.87	\$51,639.80	
10% Supervision	<u> </u>	5,163.98	\$56,803.78

Chargeable to Soule Steel Co.:

Temporary supports for reinforcing steel, including templets and spacers	53,486.56		
10% Supervision	5,348.66	58,835.22	

Miscellaneous charges to Soule Steel Co.:

Moving and repairs to boom	1,893.82		
Additional Miscell. charges	383.58	2,277.40	\$61,112.62

This of course does not take into consideration any assessments for liquidated damages.

Yours very truly,

UNION PAVING CO.

By A. LAWTON

AL:E

(Testimony of J. A. Dowling.)

Chargeable to Soule Steel Co.:				
Temporary Supports:			Material	Total
Abutment 1	Labor	\$ 2,905.64	\$ 380.28	\$ 3,285.92
Pier 1		784.71	125.52	910.23
2		5,358.26	2,781.75	8,140.01
3		13,263.77	5,332.02	18,595.79
4		8,417.89	4,732.63	13,150.52
5		2,478.63	1,059.17	3,537.80
6		2,457.19	493.61	2,950.80
7		2,185.00	730.49	2,915.49
Totals			\$15,635.47	\$53,486.56
10% Supervision				5,348.66
Miscellaneous Charges				
Moving & Repairs to Boom				\$ 1,893.82
Additional Miscell. Charges				383.58
Total				2,277.40
Total				\$61,112.62

[Pencil Notation]:

56803.78

61112.62

Total 117,916.40

[Endorsed]: Filed 4/9/43.

(Testimony of J. A. Dowling.)

Mr. Wrigley: Q. Mr. Dowling, this tabulation containing certain summarized figures, has it got the same identical totals as in the breakdown tabulation?

A. I think they are both the same, aren't they? They are supposed to be the same—same thing.

Q. Figures in this tabulation are the same totals as this?

A. Yes, they asked for a further breakdown of the amounts there.

Q. In other words, this statement was gotten up first?

A. That is correct.

Q. And they wanted a further breakdown and this one was then made up?

A. Yes.

Q. That was made up in response to their letters or demands of a statement for the cost of this work?

A. Yes, sir.

Q. To your knowledge, prior to making up the statements in question, had you ever billed Soule Steel Company for any specific amount?

A. Yes, in the early part of, I think it was, 1942, we sent them a partial bill for \$40,000.

Mr. Moore: I am going to object to that, if there is a bill in, on the ground that the billing is the best evidence, your Honor.

Mr. Wrigley: That is what I am coming to, but I do not think the witness understood my question. Will the reporter read it, because he said 1942, and this is 1941.

The Witness: I do mean the early part of 1941.

(Testimony of J. A. Dowling.)

We were all cleaned up there in May of 1941. [153]

Mr. Wrigley: Q. When you refer to an earlier billing, did you refer to this?

A. Yes, February 24, 1941.

Q. At that time the work was still in progress, was it not? A. Oh, yes.

Mr. Wrigley: We offer this as Defendants' Exhibit next in order.

(The document was thereupon received in evidence and marked "Defendants' Exhibit Y.")

Mr. Wrigley: It purports to be a billing or statement of costs up to the date of that billing.

Q. Now, Mr. Dowling, in that billing, as well as in the later billing, I note that there is an item charged there called overhead 10 per cent. What is that based on?

A. The regular overhead that you carry on all jobs—office services, insurance, tools, and equipment.

Q. Was that the usual and customary charge for overhead for such items? A. Yes.

Mr. Moore: I do not think that is a proper question, your Honor. In other words, here is a back charge. I do not know whether there is any custom or usage in connection with it.

Mr. Wrigley: I think the question of figuring cost not only includes the cost of the actual material—

Mr. Moore: I will withdraw the objection rather than argue it.

(Testimony of J. A. Dowling.)

Mr. Wrigley: Q. Was 10 per cent. the usual or customary charge to cover those overhead incidental expenses? A. Yes, sir.

Q. On the Pit River job—that was the first job of its kind for anybody to do, wasn't it?

A. It was on this coast, anyway.

Q. Based on the figures, so far as the United States Government is concerned, has it shown a loss or profit to the Union Paving [154] Company?

Mr. Moore: What is that?

Mr. Wrigley: The question was, Based upon the figures to date, does that job show a profit or a loss to the Union Paving Company?

Mr. Moore: I am going to object to that as incompetent, irrelevant, and immaterial. I do not know why the Soule Steel Company should stand his loss, if he had a loss, or why they should share in his profit, if he had a profit.

Mr. Wrigley: Nor why he should pay any part that you agreed to pay.

Mr. Moore: You haven't shown that we agreed to pay anything. I think it is improper, your Honor.

The Court: The objection will be sustained.

Mr. Wrigley: For the purpose of the record I want to show, first, by this witness that the bid was an unbalanced bid——

The Court: What do you mean by "unbalanced"?

Mr. Wrigley: Made up of many, many items.

The Court: The record is here, isn't it?

(Testimony of J. A. Dowling.)

Mr. Wrigley: And that the job showed a loss to the Union Paving Company.

The Court: Assuming it did, how does that enter into the merits of this case?

Mr. Wrigley: Only in this, that where the Union Paving Company has been forced to do and pay work that Soule Steel Company has agreed to pay or do and has not done, that enters into the picture, as I see it, of what they are supposed to do.

The Court: Whether there was a profit or loss would not determine whether there was liability.

Mr. Wrigley: I think the question of cost to Soule Steel [155] Company for labor or anything else is a factor in showing what they are supposed to do for a given amount of money.

The Court: The objection will be sustained. Let us proceed.

Mr. Wrigley: No further questions of this witness at this time.

The Court: At this time we will adjourn in any event.

(Thereupon the further hearing of the cause was continued until Thursday, April 15, 1943, at 10:00 o'clock a. m.)

[Endorsed]: Filed April 15, 1943. [156]

(Testimony of J. A. Dowling.)

Thursday, April 15, 1943

10:00 o'clock a. m.

The Clerk: Soule Steel Company v. Union Paving Co.

Mr. Moore: Ready.

Mr. Wrigley: Ready.

J. A. DOWLING,

recalled;

Direct Examination (resumed)

Mr. Wrigley: Q. Mr. Dowling, showing you a letter dated December 8, 1939, on the letterhead of the United States Department of the Interior, Bureau of Reclamation, addressed to Union Paving Company, signed by R. S. Calland, Acting Supervising Engineer, can you identify that letter?

A. Yes, sir.

Q. And the reverse side of it?

A. That is the acknowledgment of the receipt of the letter.

Mr. Wrigley: May it please the Court, without reading this, because I do not think it is necessary to go into details, identifying this job, it is a letter from the Department of the Interior Dated December 8, 1939, instructing them to proceed under their contract. We offer that in evidence as the defendants' exhibit next in order. On the reverse side is a carbon copy of a letter from the Union Paving Company to the writer, acknowledging receipt of

(Testimony of J. A. Dowling.)

that letter. In this case he used the back of that as a carbon.

The Court: It will be admitted.

(The document was thereupon received in evidence and marked "Defendants' Exhibit Z.")

Mr. Wrigley: That is both the letter and the acknowledgment.

Mr. Moore: May I interrupt one moment?

Mr. Wrigley: You may. [157]

Mr. Moore: If I might interrupt a moment, your Honor, at the last hearing I neglected to introduce this drawing of Pier 2, I think it is. It was testified in regard to and I would like to offer it at this time.

Mr. Wrigley: No objection.

The Court: It will be admitted and marked.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit 20.")

Mr. Wrigley: Q. Mr. Dowling, can you identify these writings, consisting of four pages, and tell us what that is?

A. That is the warrant of the Bureau of Reclamation for payments, certain payments to be made to the Union Paving Company by the Government.

Q. A statement of the——

A. Various payments.

Mr. Wrigley: Without attempting to read this into evidence, may it please the Court, it is the regular printed form with the tabulation. It is called "Estimate No. 20, to June 30, 1941." It purports

(Testimony of J. A. Dowling.)

to be on its face a final estimate, and it contains a summary of the work and payments up to date, also a statement of the claim of the Government against the Union Paving Company for damages, and also a statement of the various charges or deductions that the Government has made against the Union Paving Company. We offer this as the defendants' exhibit next in order.

(The document was received in evidence and marked "Defendants' Exhibit AA.")

Mr. Wrigley: Q. Now, Mr. Dowling, after Union Paving Company received that statement and estimate, did the Union Paving Company accept that as being correct? A. They did not.

Q. And they took an appeal?

A. Yes. [158]

Q. And that appeal is still pending?

A. Still pending.

Q. I show you this writing (handing a document to the witness). A. Yes, sir.

Q. Can you tell us what that is briefly?

A. From our appeal, they have split it to answer it in two separate statements, and they have just only, about sixty days ago, answered the last appeal, and we asked them for an extension of time, which they granted us, to answer their reply, I guess you would call it.

Mr. Wrigley: Without reading this entire letter in evidence, it is dated February 20, 1943, addressed to Mr. Dowling, Union Paving Company, and refers

(Testimony of J. A. Dowling.)

to his appeal, and recites, "An appeal is now under consideration and a decision should be rendered within a few days." We offer this letter in evidence as Defendants' Exhibit next in order, and Mr. Dowling has stated that they have not filed their closing statement in that matter yet.

(The document referred to was received in evidence and marked "Defendants' Exhibit BB.")

Mr. Wrigley: Q. Now, Mr. Dowling, referring back to the work on the Pit River job, did you at any time during the progress of the work request any representative of Union Paving Company to construct or install the interior false framework?

Mr. Moore: May I have that question read?

(Question read.)

A. Not above——

Mr. Moore: Just a minute. I think the question is leading, and I do not understand it, frankly,—request any representative of the Union Paving Company?

Mr. Wrigley: That is in error, if I said Union Paving Company; I meant any representative of Soule Steel Company. [159] That is an error on my part. I would ask the reporter to make that read "any representative of Soule Steel Company." The question may be answered "Yes" or "No."

A. Yes.

Q. To whom did you make that request?

(Testimony of J. A. Dowling.)

A. Mr. Stevens.

Q. Was that oral, or in writing?

A. It was oral.

Q. When?

A. It was oral to begin with, and afterwards it was in writing.

Q. When was that done the first time?

A. The first time I spoke to them about it was in July.

Q. Of what year? A. 1941.

Q. Where? A. At the jobsite.

Q. Who was present?

A. Mr. Morrisett, I think, and after that I spoke to them in September. Finally in October we served written notice on them to construct the interior bracing.

Q. Going back to the request of July, give us the substance of what you said, and what his reply was.

A. Well, I said to Mr. Stevens, "Don't you think it is about time now that we ought to get together and agree on how to apportion our respective costs for the interior framework?"

And he said he would refer it to San Francisco.

Mr. Wrigley: Going back, I would ask the reporter to read back. My attention has just been called to the fact that Mr. Dowling said that first conversation was in the year 1941.

The Witness: Oh, no, 1940—1940, it was.

Q. Was it 1940, or 1941?

A. No, no, it was 1940.

(Testimony of J. A. Dowling.)

Q. 1940? A. 1940.

Q. Following that conversation in July of 1940, and prior to the next conversation in September of 1940, did Soule Steel Company install any interior falsework or framework to support the [160] steel?

A. They did not.

Q. Now, coming to the second conversation, which you fix in September, first, where was that conversation held?

A. That was also on the jobsite.

Q. Who were present, as you remember?

A. I don't know, unless it must have been Mr. Morrisett. I used to travel around the job with him.

Q. And Mr. Stevens?

A. And Mr. Stevens and myself, yes.

Q. Give us the substance of that conversation, what you said and what Mr. Stevens said in reply.

A. I asked him if he made up his mind or determined how we should split the charges, and he said he had not. And then I said that we would be compelled under the circumstances to withhold payments beyond that time until some definite understanding had been made, those payments to cover the approximate cost of his share of the work.

Q. Did you at that time request them to do that work? A. Oh, yes.

Q. Was that request made of Mr. Stevens at that time? A. I beg your pardon?

Q. Was that request made of Mr. Stevens at that time?

(Testimony of J. A. Dowling.)

A. Oh, yes, the conversations were all had with Mr. Stevens.

Q. Going back to the first conversation, was anything said in that conversation by you or by Mr. Stevens with reference to prorating the cost of that work on any basis?

A. That is what I spoke to him about.

Q. We are talking about the July conversation now.

A. His answer to that was he would have to refer it to San Francisco.

Q. At any stage was there any agreement between Union Paving, on the one hand, and Soule Steel Company, on the other hand, as to how the costs should be divided or apportioned? [161]

Mr. Moore: I think that calls for the conclusion of the witness, your Honor.

Mr. Wrigley: Would the reporter read it?

(Question read.)

Mr. Wrigley: That calls for a statement of fact, whether they did or did not reach an agreement.

The Court: You are entitled to the conversation had, anything said or done with relation to it.

Mr. Wrigley: Q. At any stage of the work was anything said by Union Paving Company and agreed to, accepted by Soule Steel Company or said by Soule Steel Company and agreed to by Union Paving Company as to the basis on which the costs should be apportioned?

Mr. Moore: I think that is subject to exactly the same objection, your Honor. Identify the time, place, who was present, and what was said.

(Testimony of J. A. Dowling.)

The Court: Objection sustained.

Mr. Wrigley: The question really calls for a "Yes" or "No" answer.

The Court: Develop the facts, whatever they are.

Mr. Wrigley: That is what I am trying to do and I am apparently not asking the proper question.

Q. Talking again of the prorated costs, were there any conversations as to how they should be prorated? A. After the signing of the contract?

Q. After the signing of the contract, up to any time after that. A. No, no, not with me.

Q. Other than the conversation that you referred to in September, 1940, in which you stated to Mr. Soule that they should pay a prorata of that cost, you referred to later requests [162] to prorate it?

Mr. Moore: I didn't understand that. Pardon me. May I have that question read?

(Question read.)

Mr. Moore: I do not understand the question, frankly.

Mr. Wrigley: In his previous testimony he said, just a minute ago, that after September there were written requests to prorate. I want to develop what those written requests were.

Mr. Moore: I have no objection to that, if you produce them.

The Witness: Yes, that happened in November.

Mr. Wrigley: Q. Of what year?

The Court: Q. What happened in November?

A. We demanded of Soule Steel Company that

(Testimony of J. A. Dowling.)

they proceed to do the bracing for their steel bars—that was on or about the 24th, I think—and at that time he agreed to do it.

Mr. Moore: Q. Just a minute. Are you discussing conversations, or letters, or what, may I ask?

A. Conversations preliminary to letters.

Q. I still don't understand. Is that a conversation with Mr. Soule?

A. Mr. Stevens.

Q. In November?

A. In October.

Mr. Wrigley: The actual writings I will produce later, or offer them for introduction when I call Mr. Soule as my own witness under Rule 43. No further questions.

Cross-Examination

Mr. Moore: Q. Mr. Dowling, you say you had a conversation with Mr. Stevens in July, is that correct?

A. Yes, sir.

Q. Up to that time, starting in in March of 1940, monthly progress billings had been made by the Soule Steel Company to the Union Paving Company for the steel that had been installed, is that [163] correct?

A. That is correct, sir.

Q. And those started in in March, is that correct?

A. That is correct.

Q. And were rendered monthly thereafter?

A. They were.

Q. And as those bills were rendered, did you ever object to the bills to the Soule Steel Company?

A. Yes.

Q. In writing or verbally?

(Testimony of J. A. Dowling.)

A. I don't know whether that was verbal—I think it was verbal.

Q. With whom?

A. We notified Mr. Stevens that we would not pay any more money until some adjustment was made.

Q. That was in July?

A. No, that was the first conversation I had, asking him if we could get together and try to arrange some formula or something to charge each other with their respective portion of the work.

Q. That was in July, was it not?

A. That was in July. And then after that, at the second meeting, I told him at that time we would not pay any more money until something was done about it.

Q. But you had received these bills monthly and had made no objections to them until sometime in July, is that correct?

A. That is correct. There were only three payments due at that time, or three payments that were made, I know.

Q. You did not make any objection to Mr. Soule, is that correct?

A. Up to that time?

Q. Yes.

A. To July?

Q. Yes.

A. No, I had not.

Q. I am referring now to Mr. Soule and not Mr. Stevens. Had you made any objections to Mr. Soule?

A. No, most of our objections were to Mr. Stevens on the job.

(Testimony of J. A. Dowling.)

they proceed to do the bracing for their steel bars—that was on or about the 24th, I think—and at that time he agreed to do it.

Mr. Moore: Q. Just a minute. Are you discussing conversations, or letters, or what, may I ask?

A. Conversations preliminary to letters.

Q. I still don't understand. Is that a conversation with Mr. Soule? A. Mr. Stevens.

Q. In November? A. In October.

Mr. Wrigley: The actual writings I will produce later, or offer them for introduction when I call Mr. Soule as my own witness under Rule 43. No further questions.

Cross-Examination

Mr. Moore: Q. Mr. Dowling, you say you had a conversation with Mr. Stevens in July, is that correct? A. Yes, sir.

Q. Up to that time, starting in in March of 1940, monthly progress billings had been made by the Soule Steel Company to the Union Paving Company for the steel that had been installed, is that [163] correct? A. That is correct, sir.

Q. And those started in in March, is that correct? A. That is correct.

Q. And were rendered monthly thereafter?

A. They were.

Q. And as those bills were rendered, did you ever object to the bills to the Soule Steel Company?

A. Yes.

Q. In writing or verbally?

(Testimony of J. A. Dowling.)

A. I don't know whether that was verbal—I think it was verbal.

Q. With whom?

A. We notified Mr. Stevens that we would not pay any more money until some adjustment was made.

Q. That was in July?

A. No, that was the first conversation I had, asking him if we could get together and try to arrange some formula or something to charge each other with their respective portion of the work.

Q. That was in July, was it not?

A. That was in July. And then after that, at the second meeting, I told him at that time we would not pay any more money until something was done about it.

Q. But you had received these bills monthly and had made no objections to them until sometime in July, is that correct?

A. That is correct. There were only three payments due at that time, or three payments that were made, I know.

Q. You did not make any objection to Mr. Soule, is that correct?

A. Up to that time?

Q. Yes. A. To July?

Q. Yes. A. No, I had not.

Q. I am referring now to Mr. Soule and not Mr. Stevens. Had you made any objections to Mr. Soule?

A. No, most of our objections were to Mr. Stevens on the job.

(Testimony of J. A. Dowling.)

Q. Did you make any objection to Mr. Soule, or to the home [164] office of the Soule Steel Company until sometime late in October?

A. That is correct.

Q. That is the first time you ever made any objection?

A. Served notice on Mr. Stevens and also on the Soule Steel Company.

Q. You are charging now the Soule Steel Company 100 per cent of the cost of erecting this framework, is that correct?

A. A portion of the framework.

Q. Well, those interior frameworks?

A. A portion of the job. They were not assessed or any claim filed for Abutment 2, Abutments 3 and 4, or Piers 8, 9 and 10.

Q. When did you start work on Abutment 1?

A. Did we start working? We started early in the year.

Q. Did you make any demand on the Soule Steel Company at that time that they install any of that falsework and abutment work?

A. No, I assumed that was part of their contract.

Q. Will you please answer the question? Did you make any demand on the Soule Steel Company?

A. Did I? No, sir.

Q. At the time the job started, that they put in any of this falsework? A. I did not, sir.

Q. The same is true, you made no demand on them until the job had run for eight or nine months, is that correct?

(Testimony of J. A. Dowling.)

A. Eight or nine months—September to March? That is about three months, isn't it?

Q. From March to October—that was the first time you had ever communicated, as I understand, with the Soule home office?

A. That is correct, I guess, yes.

Q. During all that time you had made no demand on them of any kind, character or description other than the ones you referred to of Mr. Stevens?

A. Mr. Stevens, yes—well, he was a [165] partner.

Q. You had paid in July \$5000 on account, had you not? A. Yes.

Q. And in August \$12,486.25?

A. Something like that.

Q. And in September, on the 21st, you paid \$9126.04, did you not? A. Yes, sir.

Q. That practically paid your contract in full?

A. Up to that time.

Q. On the monthly billings that had been rendered to that time? A. Yes.

Q. You refused to pay any more money at that time, did you not, and did not pay the Soule Steel Company any additional money until July 18, 1941, is that correct?

A. December, 1940 we paid them \$20,000, and then paid them another one, I believe, in January, 1941.

Q. At the time you entered into this contract, did you understand at that time the Soule Steel Company were to install all the falsework?

(Testimony of J. A. Dowling.)

back over a written contract, which is prevented by Section 1625 of our Code. The parties agreed to a writing, in which the obligations of each party were stated. An attempt to reopen that in order to vary the contract I say is objectionable.

Mr. Moore: We are not attempting to vary it, if it please your Honor, because as I have listened to the testimony and have read the contract, there isn't the lightest word in that contract that requires the Soule Steel Company to install any of this interior framework. In light of the claims being made, we take it that the contract was sufficiently indefinite to enable us to produce the understanding of the parties at the time the contract was made. In other words, there are several criterions of interpretation. One of them is what the parties did under the contract, to which Mr. Dowling has just testified. I believe it was Lord Suttan who said, "Tell me what a man did under a deed and I will tell you what it means." In other words, we have one criterion now of interpretation and the other one is the negotiations which led up to the making of the contract, and I think it is perfectly relevant and proper under the circumstances, in light of the charges that are made here, to go into the making of that contract.

Mr. Wrigley: In the first place, may it please your Honor, the master contract, if we might call such the contract between Union Paving Company and the United States Government, said that the contractor was to furnish whatever was necessary

(Testimony of J. A. Dowling.)

to erect that steel. That provision was expressly assumed by this written contract. Not only did they assume 23, 34, and 45, [168] but they expressly agreed to 66, which says that they will do that, and on top of that, as if that were not clear, the contract goes on to provide that the contractor, which is the Union Paving Company, "at its own cost, agrees to provide an accessible roadway from Highway 99 to the base of all piers and abutments, construct a wooden trestle over and above the base of the piers, and construct wooden cores, as shown in the plans, which may be used by the subcontractor as a supplementary support for reinforcing bars."

In other words, it says expressly what the contractor is to do, and they say they are going to do everything else. That is the writing, and we think that writing is clear and explicit on its face, and they have no right legally, we feel, to go back and try and show that they agreed to something orally contrary to this writing. That is our objection.

Mr. Moore: The contract provides, your Honor, among other things, that time is of the essence of this agreement, and the subcontractor agreed that it would proceed with the placing of reinforcement bars in sections of the piers and abutments made ready for such placement immediately after being notified by the contractor of the readiness of each section, and prosecute the same diligently to completion, unless prevented by strikes, lockouts, or other contingencies beyond its control. In this connection, your Honor, we propose to prove that nego-

(Testimony of J. A. Dowling.)

tiations started about October 4th, which has been testified to, subject to a motion to strike out; that on December 11th Mr. Soule dictated a proposed bid; that on December 29th there was a conference had at the Soule Steel Works, in which a large drawing of Pier 3 was presented, and in which Mr. Soule outlined in there, under Mr. Cochrane's and Mr. Dowling's sug- [169] gestion, this framework that was to go in to hold it up, and at that time Mr. Dowling and Mr. Cochrane said, "Now, we will provide—" or said in substance, "Now, we will provide this framework. You boys sharpen your pencils and see where we get on prices. You will be entitled to use that framework in your placement of the reinforcing steel." After lunch they had a further session, and in that session they horsetraded, if you want to term it that, the price, the final price being agreed on was \$22.50 a ton for placing the steel. They reduced that amount, your Honor, to approximately half of the contract price—all done under the administration of the Union Paving Company. This letter or bid of Mr. Soule's dated December 11, 1939—we have taken Mr. Dowling's deposition and he has a copy of this in his files; Mr. Soule has one in his files—and each provision in this was taken up, we propose to prove, at this meeting and discussed; and in there there is one provision——

The Court: Pardon me. What was the date of the meeting?

Mr. Moore: December 9, 1939. The contract was

(Testimony of J. A. Dowling.)

signed January 6, 1940, one week later, and in this meeting it was provided, No. 8, "You are to furnish wood supporting framework"—this is a letter from the Soule Steel Company to the Union Paving Company. Mr. Dowling has an exact copy of this in his deposition. We propose to prove that Mr. Dowling took this with him and drew up this agreement. In other words, he prepared the agreement, not Mr. Soule. We maintain, your Honor, that this provision, here, was understood by Mr. Soule at the time to the effect that the subcontractor agrees to proceed with the placing of the reinforcement bars in sections of the piers and abutments made ready for such placement immediately after [170] being notified by the contractor of the readiness of each section. It was understood at that time by Mr. Soule that that provision referred to the building of this interior framework. In other words, we say, your Honor, that the negotiations that led up to this, the circumstances that surrounded the making of this contract were such that the contract, itself, required interpretation, and that the letter of December 11th, which was the memorandum of the parties as to what they agreed to, is properly admissible in evidence. In other words, the contract, itself—there were no changes made after this conference of December 29th—there was merely a draft drawn up—but there were no further conferences. The whole thing was closed on that day except the formal signing of the contract. We take the position that the evidence of the negotiations of the parties, the cir-

(Testimony of J. A. Dowling.)

circumstances surrounding the making of the contract are all admissible so that this Court may be placed in the shoes of the contracting parties and interpret this contract as it was intended by them to be interpreted.

Mr. Wrigley: Our position is simply this: You could call it horse trading or, in contract parlance, offers which were absolutely rejected, and when those offers were rejected and the parties signed a contract in writing, that contract expressly supersedes all the prior negotiations. Now, we think that Section 1625 of the California Civil Code expressly covers this. The execution of a contract in writing, whether the law requires it to be written, or not, supersedes all the negotiations or stipulations concerning this matter which preceded or accompanied the execution of the instrument. Now, here they make an offer to do certain things for certain money. That is rejected, and they come back and make an entirely different contract [171] for something entirely different, at an entirely different price, and we say that the prior negotiations have no legal relevancy at all. That is the basis of our objection.

Mr. Moore: There is nothing in this contract, your Honor, that requires them to put up this framework. I, frankly, can't see it. I think the contract is clearly indefinite, and it is proper that the circumstances leading up to the execution of the contract be admitted in evidence.

Mr. Wrigley: Again we say, your Honor, the contract is express, definite, and clear.

(Testimony of J. A. Dowling.)

The Court: In relation to this framework construction?

Mr. Wrigley: Yes, your Honor.

The Court: Read it.

Mr. Wrigley: In the first place, I am reading now from the master contract, which they assumed, and I am only reading the parts which I think are the pertinent parts, reading first from Section 23:

“The cost of handling and installing minor miscellaneous items of timber, metal and other work, for which specific prices are not provided in the schedule shall be included in the prices bid for the work to which they are appurtenant.”

Then we come to Section 24 of the master contract:

“The contractor will be required to furnish all form materials, including oil for oiling forms; all wire, wire ties; or other appliances used for holding forms and for securing reinforcement bars; metal or other temporary supports, if used, for reinforcement bars and other metal work; welding rods for welding reinforcement bars; all backfill material; all gravel and broken rock or boulders [172] for dry rock paving; gravel or broken rock for drain pockets; all water used for mixing, cleaning, curing, and cooling concrete and mortar and for moistening backfill materials to be compacted; and also all other materials not a part of the completed construction work required for the completion of the contract. The contractor will be required to haul all of these materials, as well as all of the materials delivered to the contractor by the Government. The cost of

(Testimony of J. A. Dowling.)

hauling all of the materials described above and of furnishing all of the materials required to be furnished by the contractor shall be included in the unit prices bid in the schedule for the work for which the materials and hauling are required.”

Then coming to Section 45 of the so-called master contract,—

“The contractor shall provide all clamps, tie rods, cables, blocking, anchors and other accessories that may be required for holding the reinforcement bars in position while the joints are being welded and shall furnish all welding electrodes and hacking up strips required for welding the reinforcement bars.”

Further on in Section 45,—

“The ends of the bars shall be matched accurately and shall be retained in the position shown on the drawings during the welding operations.”

Now, coming to 66,—

“Payment for placing reinforcement bars will be made at the unit price per pound bid therefor bid in the schedule, which unit price shall include the cost of furnishing and attaching wire ties and metal supports if used, of unloading, hauling, sorting, storing, cutting, [173] bending, cleaning, placing, and securing and maintaining in position all reinforcement bars, as shown on the drawings or as directed by the contracting officer.”

Now, that is what they assumed and agreed to do, with the one limitation in the subcontract; in other words, they agreed to do everything that Mr.

(Testimony of J. A. Dowling.)

Dowling or his company agreed to do, except that Mr. Dowling agreed, after we have the provisions whereby they assume paragraphs 23, 24, 45 and 66.—

“The contractor at its own cost agrees to provide an accessible roadway from Highway 99 to the base of all piers and abutments; construct a wooden trestle over and about the base of all pier excavations and construct wooden cores as shown on the plans which may be used by the contractor as a supplementary support for reinforcement bars.”

The Witness: The subcontractor.

Mr. Wrigley: Q. I beg your pardon?

A. You said “contractor.”

Mr. Wrigley: The contractor. This subcontract defines the contractor as being the Union Paving Company and the subcontractor as being the Soule Steel Company.

Then going on, as if that were not clear, we come to the price:

“The contractor agrees to pay said subcontractor for placing reinforcement bars at the rate of \$22.50 per ton for reinforcement bars actually placed in accordance with the plans and specifications which shall be considered as full compensation for unloading, warehousing, hauling, bending, and placing reinforcement bars and clamps, and doing all work necessary or incidental thereto, and for furnishing all tie wire, clamps and supporting devices.” [174]

In other words, that \$22.50 includes this interior framework or falsework which holds up the steel,

(Testimony of J. A. Dowling.)

and if they do not do it, we say they have not done \$22.50-a-ton's worth of work. We think the contract and the subcontract are clear and explicit as to what each is to do, and you can't go back of it and say we talked about doing something else. The fact is they agreed to do certain things irrespective of what they talked about.

Mr. Moore: In the first place, your Honor, Sections 23, 24, and 25 are expressly limited in the Soule-Union Paving Company contract.

"The subcontractor at its own cost agrees to provide all labor, materials, tools and equipment or other means and promptly unload all reinforcement bars from cars delivered at Redding, California, check and haul the same to the job site and provide suitable warehouse or other means of protection for any material requiring storage or protection, in accordance with the provisions of paragraph 23."

In other words, they do not assume by any manner or means the entire obligations of paragraph 23 of the master contract. They assume certain specific things, that is, the unloading, hauling and warehousing. The same is true of the subcontract paragraph 24:

"The subcontractor at its own cost agrees to provide all labor, wire, wire ties, rods or other materials and appliances used for securing reinforcement bars, metal or other temporary supports, if used, to hold reinforcement bars during the placing of concrete, including backing up strip required for welding, in accordance with the provisions of para-

(Testimony of J. A. Dowling.)

graph 24." [175] Mr. Soule has testified already that he did do those things.

"Paragraph 45. The subcontractor at its own cost agrees to provide all labor, materials and equipment, and cut the end of the bars for welding, and provide all clamps, tie rods, cables, blocking anchors, and other accessories that may be required, including placement of backing up strips, and shall firmly and securely hold the reinforcing bars in position while the joints are being welded in accordance with the provisions of paragraph 45."

Then he does assume all the requirements of paragraph 66 of the master contract. And, as I said before, it provides here, and there has been no explanation made by Mr. Wrigley yet, time is of the essence of this agreement, and the subcontractor agrees that it will proceed with the placing of reinforcement bars in sections of the piers and abutments made ready for such placement immediately after being notified by the contractor of the readiness of each section and prosecute the same diligently to completion.

We have a rather amazing situation here, your Honor, as I see it. Mr. Dowling says that he talked to Mr. Stevens sometime in July or September about splitting or apportioning the cost. Mr. Dowling has to take the unequivocal position, in the light of subsequent events, the very day this contract was drawn he understood that Soule was to put in this interior framework. He could not have figured it out later, six or seven months

(Testimony of J. A. Dowling.)

later; he had to take that unequivocal position. Yet he received bills from Soule and paid them. He made no demand on Soule. He put up this falsework. He made no request of any kind for months. When the job got so far, he got hold of the superintendent and said, "Here, you have got to do this." The [176] construction he has placed on it in and of itself is very clear evidence of the understanding of the parties. There is not a word in this contract in which it definitely says this interior framework, the burden of putting that up, buying the steel rails that went into it, paying for the labor, and so on, should be placed upon Soule. It is admitted, and has to be admitted, that this interior framework or falsework was for use in pouring the concrete. They could not, to use the expression, use sky hooks for pouring that concrete. It was used for two purposes. It was used for pouring the concrete, and yet today the Union Paving Company says to Soule, "You are to donate that to us for our free use, this structure which we say should have put up, so we could have poured our concrete free of charge."

There is nothing like that in the contract, and, as I say, your Honor, the circumstances which led up to the making of this contract, the circumstances under which it was made, and, in fact, in this offer, which Mr. Dowling has a copy of, there is a clear meeting of the mind as to what each was required to do. The contract, itself, is here, and Mr. Wrigley cannot point to any particular provision that

(Testimony of J. A. Dowling.)

says Mr. Soule should put in the \$60,000 of framework that was used in the construction of these piers.

We submit, your Honor, the testimony is admissible, and under decisions, of which we can cite many, but which I think is unnecessary, we believe our position is supported. Mr. Wrigley has cited here the Code provision which has to do with a situation where there is no ambiguity about a contract, but all the decisions hold that if there is the slightest ambiguity or uncertainty, the court should hear the oral evidence of the [177] understanding of the parties and the circumstances.

The Court: Read the question, Mr. Reporter.

Mr. Wrigley: I would like the opportunity to reply to Mr. Moore's statement.

The Court: Proceed.

Mr. Wrigley: In the first place, either Mr. Moore has not yet gotten the picture, or he is intending to not state it clearly. We start with a contract in writing as of a certain date. Now, Soule Steel Company started the placing of steel in March, the latter part of March. Up to July practically no steel, or less than, as I remember it, one-tenth of the steel had been placed. The contract up to that time did not require Soule Steel Company to build any framework. No framework was necessary up to that time. Up to that time we were acting under and in accordance with the provision that all the framework in the base was to be done by the Union Paving Company, that

(Testimony of J. A. Dowling.)

they were to construct the wooden trestle over and above the base, and it was not until July that they got above the base of the these piers, requiring interior framework. Then, for the first time, the question comes up of Soule having to do something. They didn't have to do anything in March because there was nothing for them to do. They didn't have to do anything in April, they didn't have to do anything in May, nor they didn't have to do anything in June. In July, Mr. Moore says, "You did not take it up with Soule Steel Company." Mr. Stevens was on the job and a partner. They took it up with Mr. Stevens and attempted to work out some agreement of prorating those costs. It cannot be said that they did those things voluntarily because they were under compulsion of time. The contract with the Federal Government limited the time. It has to be done, [178] not done after you get through fighting over it, but it has to be done immediately. There is a penalty of \$100 a day on each contract unit and, as shown by that exhibit, the penalties for delay on this job came to \$46,000, as I remember it. Union Paving Company could not wait. The work had to be done. If Soule did not do it they had to do it. They could not argue over it. But they took it up with the man on the job. They took it up with him and he said he would refer it to the San Francisco office. Presumably he did. Anyway, by September they had got no action yet. They took it up with him again and with the same result. So, finally, in desperation,

(Testimony of J. A. Dowling.)

knowing they couldn't deal with Mr. Stevens up there any more and get results, they put in writing and sent it to the contracting party, Soule Steel Company, sent it to the home office, as well as to Mr. Stevens on the job.

We submit that that contract is clear and definite as to just what Union Paving Company was to do. In other words, they were to do the constructing of the wooden trestle over and about the base of all pier excavations, and that was the work that was going on substantially up to July, but in July for the first time there comes up the question of erecting interior falsework or framework. We submit that we cannot go back to prior negotiations.

Mr. Moore: I do not like to criticize, but, as a matter of fact, your Honor, Abutment 1 was completed May 4, 1940, and the U. P. back charge there was \$136.14. In other words, this entire erection of Abutment 1 was completed and no claim made against it. Pier 1 was completed June 30, 1941, and they have a U. P. back charge there of \$1000. Pier 2 was completed September 14, 1940, before this was ever taken up with the home [179] office. Mr. Wrigley is in error, because the work was completed and no charge was made for these abutments when they were finished. It was long after—Abutment 1 had been finished four or five months before this question came up.

The Court: Read the question Mr. Reporter.

(The reporter, reading:

(Testimony of J. A. Dowling.)

“Q. As a matter of fact, on December 29, 1939, did you not have a conference at the office of the Soule Steel Company with Mr. Cochrane, who was then your superintendent, Mr. Stevens, and Mr. Soule?”)

The Court: The objection may be overruled. You may answer.

A. I don't recall the meeting. Some of them had a meeting there. I don't recall it.

Mr. Moore: Q. Mr. Dowling, don't you remember going up to the drafting room where Mr. Soule had a drawing of the interior of Piers 3 and 4?

A. I testified to that in the deposition.

Q. Isn't this the document (indicating)?

A. That is not the document.

Q. That is not the document?

A. It was on manila paper.

Q. There was a drawing there, an enlargement of a Government drawing of Piers 3 and 4?

A. I testified in the deposition it was about 2-1/2 feet wide by 10 feet long.

Q. And at that time didn't Mr. Cochrane and yourself tell Mr. Soule how you proposed to construct the interior of these piers?

A. We certainly did not.

Q. And did not Mr. Soule take a T square and a rule and trace in on this drawing the type of construction that you proposed to put there?

A. No, sir. May I finish that question?

Q. Sure.

A. There was a preliminary drawing drawn up

(Testimony of J. A. Dowling.)

first on a small piece of paper, and then I think we went out to lunch, [180] if I remember correctly, went down to the Brannan street place, Manning's, and when we came back I think it was drawn up by a man in Mr. Soule's employ—Mr. Harry Gorham, I think his name is.

Q. That is your recollection now? A. Yes.

Q. Where was that done, up in the drafting room? A. Up in the drafting room, yes.

Q. Before lunch, was it not?

A. It was worked up before lunch, sketched.

Q. Who laid out the type of construction that was going in there, yourself and Mr. Cochrane?

A. Everyone there. Everyone standing around there had some suggestions to make.

Q. Wasn't there some conversation had at that time? You said, "Now, you can see what type of construction we are going to put up. You can place your bars against that. You had better get your pencil out and figure it"?

A. No, sir, that was never said.

Q. As a matter of fact, after lunch didn't you and Mr. Cochrane walk out, and before you went you told Mr. Soule and Mr. Stevens that they had better get a price that would be acceptable to you, and you came back in the course of about an hour and sat down in their office downstairs and had a conversation with regard to the price that was going to be charged?

A. And I accepted that price?

Q. Yes. A. No, sir.

(Testimony of J. A. Dowling.)

Q. As a matter of fact, weren't you holding out for \$22.25, and Mr. Soule wanted \$22.75, and Mr. Cochrane and Mr. Stevens both said, "Why don't you split the difference?"

A. If you will take that letter of Mr. Soule's that you are talking about, with the interlineations in there, you will find he wanted \$24.80. [181] When he put it in there with pencil, he scratched out the Engineer, \$300 a month for sixteen months with his expenses, his automobile to get the job, 16 miles from Redding, and he had about 75 to 80 cents a ton right there; and the constructing of the trestles and costs for his supplemental work would also reduce that. Mr. Soule had no exclusive grip or hold on that job.

Q. I will hand you a letter dated December 11, 1939, produced by your counsel. A. Yes, sir.

Q. That has been in your possession since some-time in December, has it not?

A. December? Yes, I guess it was December 11th, I think it was. Let me just show you here——

Q. Just pardon me. Let me identify the letter and I will. A. Excuse me.

Q. Wasn't this letter before you and Mr. Soule at the conference that you had in his office after you came down from the drafting room?

A. Wasn't it before?

Q. No, wasn't this draft that you produced in your and Mr. Soule's possession after you left the drawing room?

Mr. Wrigley: Just a second, Mr. Dowling. So

(Testimony of J. A. Dowling.)

the record will be clear, will it be stipulated, in the interest of time, that I object to this entire line of examination, that it all goes in subject to my objection and my motion to strike?

Mr. Moore: It will be stipulated.

Mr. Wrigley: I do not want to object to every question on the same grounds.

A. I think it was about November 17th or 18th, somewheres along in there, that is, when we were in that drafting room, and this letter comes subsequent to that.

Q. You are positive of that?

A. That is the typewritten portion of it, and then when Mr. Soule came in the office later on, after [182] closing the contract, he had the pencil portion inscribed in there.

Q. Wasn't this pencil portion placed on there in Mr. Soule's handwriting?

A. Yes, sir, that is correct.

Q. And isn't it a fact that that writing was placed there in the presence of yourself, Mr. Stevens, and Mr. Cochrane?

A. No, sir, that was put in in our office.

Q. In your office?

A. Yes, when he came down to close the contract. May I say something further about this, if it isn't out of order?

Mr. Moore: I am going to introduce it.

The Witness: All right.

Mr. Moore: I will introduce this in evidence, your Honor.

Mr. Wrigley: Same objection.

(Testimony of J. A. Dowling.)

Q. As a matter of fact, weren't you holding out for \$22.25, and Mr. Soule wanted \$22.75, and Mr. Cochrane and Mr. Stevens both said, "Why don't you split the difference?"

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Mr. Moore: I am going to introduce it.

The Witness: All right.

Mr. Moore: I will introduce this in evidence, your Honor.

Mr. Wrigley: Same objection.

(Testimony of J. A. Dowling.)

The Court: Let it be admitted and marked.

(The document was thereupon received in evidence and marked "Plaintiff's Exhibit 21," and was read by Mr. Moore.)

PLAINTIFF'S EXHIBIT NO. 21

Los Angeles

Telephone

Portland

Valencia 4141

Houston

[Emblem] (SS Co. Iron and Steel Products)

Soule Steel Company

Iron and Steel Products

1750 Army Street, San Francisco

December 11, 1939

Gentlemen:

Re: Abutments and Piers, Pit River Bridge
Relocation of Southern Pacific Railway
and U. S. Highway 99

In regard to the labor of installing the reinforcing steel bars, Bid item No. 11, as specified for the construction of the above project in accordance with plans and specifications prepared by the United States Department of the Interior, Bureau of Reclamation, we are pleased to quote you as follows:

1. We are to receive the reinforcing steel bars f. o. b. cars Redding, California.
2. The 2" square bars are to be bent at supplier's mill, all other bars are to be furnished in straight lengths.
3. We are to be responsible for the unloading,

(Testimony of J. A. Dowling.)

checking and handling of said reinforcing steel upon arrival at Redding upon a lot to be provided by you. us, ~~(We estimate the storage lot size should be about 150' x 350' and adjoining a rail track.)~~ [the rental of which shall not exceed \$30.00 per month.*]

4. We will do the cutting, bending and shaping of 2" bars preparatory to welding, loading on to trucks and transporting to jobsite to conform to your construction schedule.

5. You are to provide an easy and accessible roadway from the main highway to the base of the piers and abutments as required and a leveled portion around the piers, [or a wooden trestle which we may be for our use.*]

6. We will furnish all labor (including insurance) to do the placing of the reinforcing steel, including tie wire and accessories under above bid item No. 11 (but not including welding).

[Fig. 7 in circle].

[are to furnish wood supporting framework*]

7. You ~~will pour concrete~~ "pyramids" ^ in the base of piers # 1, 2, 3, 4, 5, 6 and 7 (and/or will furnish and erect wood core forms and/or steel supports, against which the 2" bars can be supported.)

8. We have provided in this proposal for a job engineer 16 months ~~at \$300.00 per month, which cost will be borne equally.~~

Marginal notation [omit].

[*Printer's Note: Words in light brackets were inserted in copy in pencil.]

(Testimony of J. A. Dowling.)

9. Sufficient lights will be furnished by you; also power outlets will be available for our use.

Price: As specified for the above items, the unit price of \$24.80 per ton.

If a bond is required, the same will be for your account.

Payments are to be made on or about the 10th of the following month for 85% of the value of the work performed during the preceding calendar month, and the remaining 15% to be paid 30 days after completion of our portion of the work.

Note: We are not to be held responsible for failure by delay or default arising from strikes, lockouts or other contingencies beyond our control.

If the above is in accordance with your understanding, please accept in the lower left hand corner, and it will constitute an agreement between us.

Sincerely yours,

SOULE STEEL COMPANY

By EDW. L. SOULE

Accepted:

UNION PAVING COMPANY

By

[Figure seven in circle.]

[You are to pour concrete "sills" as required, in the base of the piers to support the reinforcing steel mats in the bottom of the piers. On the steel reinforcing mats, the steel shoes, which support the 2" vertical bars, are to be placed.*]

ELS:DL

[*Printer's Note: Words in light brackets were inserted in copy in pencil.]

(Testimony of J. A. Dowling.)

Quotations subject to change without notice. All sales, contracts or agreements subject to strikes, accidents or causes beyond the company's control.

[Endorsed]: Filed 4/15/43.

Mr. Moore: Q. And that handwriting is Mr. Soule's? You recognize the handwriting?

A. Yes.

Q. Would you say that was put on in your office? A. Yes.

Q. Prior to the making of the contract?

A. Prior to the making of the contract.

Q. When Mr. Soule wrote that in in pencil——

A. I believe he did, yes.

Q. Did he have another copy of the same document that he wrote in in pencil, too, in your presence? A. I don't know.

Q. Didn't you see him write both of them in your presence?

A. I can't say that he did. He might have.

Q. You used that document that you have there in the preparation of the contract, did you not?

A. No, the contract was drawn [183] before we got the document.

Q. That was drawn afterwards, is that correct?

A. It was drawn afterwards.

Q. This letter of December 11th?

A. Yes, before the preliminary contract was drawn, which was submitted to you in your office, also.

(Testimony of J. A. Dowling.)

Q. Was this drawn before or afterwards?

A. Which?

Q. This letter.

A. This letter was drawn before.

The Court: For the purpose of the record, identify it.

Mr. Moore: Exhibit 21.

Q. What I am trying to get at is when was Mr. Soule's handwriting placed on that?

A. To the best of my knowledge it was placed on at our office.

Q. Before the contract was executed and signed, is that correct? A. Yes.

Q. And that would evidence your understanding at that time and your agreement, did it not?

A. No, he is quoting this \$24.80 here.

Q. I mean aside from the price? A. No, he agrees—he requires here to have the bars bent at the mill in one section and in the next section he says he will do it himself.

Q. Didn't you take up with him at the time and discuss each one of those paragraphs?

A. We discussed the contract, yes.

Q. And you reached a meeting of minds?

A. No, he was seeking a contract, and I was seeking the best contract I could get from him, or from others. He had no exclusive right to this contract.

Q. What memorandum, if any, did you use in drawing the contract? You actually prepared this contract which is in dispute, did you not?

(Testimony of J. A. Dowling.)

A. Quite true. [184]

Q. As I understand, you wrote it out in long-hand?

A. That is correct.

Q. And turned it over to your stenographer?

A. That is correct.

Q. What data did you use in preparing that contract?

A. I took the Government specifications and followed each paragraph of the specifications, with exceptions.

Q. Didn't you have that letter before you at that time?

A. Which letter?

Q. The one you have in your hand.

A. No, sir.

Mr. Moore: Might we have a recess for a few moments, your Honor?

The Court: Yes.

Mr. Moore: I think I am pretty near through with this witness.

(Recess.)

Redirect Examination

Mr. Wrigley: Q. Mr. Dowling, showing you this writing on the letterhead of the Soule Steel Company, consisting of two pages, bearing date of December 11, 1939, which has been marked "Plaintiff's Exhibit 21," which in the first instance was on the typewriter with penciled inter-lineations on it, I ask you did that writing in any respect constitute a basis for drafting the contract which was later signed on January 6, 1940?

A. It did not.

(Testimony of J. A. Dowling.)

Q. Was the contract of January 6, 1940 developed by you before or after you received this writing?

A. It was worked up before we received this writing.

Q. Now, at or about that time did you receive written offers from other firms for this work?

A. We did.

Q. Oral, or in writing? A. In writing.

[185]

Q. Have you any of those officers with you?

A. Yes, sir.

Q. Showing you this on the letterhead of Sherwood S. Cross, Engineer-Contractor, 2422 Washington Avenue, Santa Monica, California, dated October 12, 1939, addressed to Union Paving Company, I asked you to tell us what that is.

A. This is a proposal to set the steel on the job, the Pit River job, at \$24 a ton, and a price there for the welding in addition to that.

Mr. Wrigley: For the Court's information, I would like to read this.

(The document referred to was thereupon read by Mr. Wrigley.)

Mr. Wrigley: We offer that as Defendants' Exhibit next in order.

(The document was thereupon received in evidence and marked "Defendants' Exhibit CC.")

Mr. Wrigley: Q. Just for the purpose of the

(Testimony of J. A. Dowling.)

record, so as to clear it up at this time. that letter was received on or about its date, October 12th?

A. Yes, sir, shortly after the bids were submitted.

Q. Have you other firms that were making offers, written or oral, for this work at that time?

A. There were some oral offers.

Q. Were there any other written offers?

A. No.

Q. Now, Mr. Moore asked you about the receipted bills for March, April, May and June, presumably, and asked you if prior to July you made any countercharge or complaint against them for installing falsework. What was the status of the work at that time? In other words, how far had the work progressed as to Abutments 1 and 2?

A. In July——

Q. July of 1940.

A. There were only two—Abutment 1 was completed. Abutment 2—there was no charge there against Mr. [186] Soule—a portion of Pier 1 in July, and then in August——

Q. Pardon me for interrupting.

A. A small portion of the steel had been set at that time, in tonnage.

Q. As to Pier 1, which was the second unit under the contract, what was the status of that work as of the time of your first conversation with Mr. Stevens?

A. That was completed at the very end of

(Testimony of J. A. Dowling.)

June—I think the 29th or 30th—somewhere along in there.

Q. Now, Pier No. 2, what was the status of that work at the time of your first conversation with Mr. Stevens?

A. Oh, very, very little. There was nothing above the trestle.

Q. What do you mean by “above the trestle”?

A. Well, above that—over the base of the pier.

Q. Now, will you come to the next unit, Abutments 3 and 4, and Piers 8, 9, and 10; what was the status of that work?

A. There was no charge against Soule for that.

Q. The next unit under the contract, Pier 3, what was the status of that work at the time of your first conversation with Stevens?

A. No work over the base of the pier.

Q. The next unit they give, Piers 6 and 7, what was the status of that?

A. There was nothing at all.

Q. The next unit, Pier 5, what was the status of Pier 5?

A. Nothing on Pier 5.

Q. And Pier 4, which was the last unit.

A. No, there was nothing there. That was one of the largest piers, too.

Mr. Wrigley: That is all.

Mr. Moore: No further questions.

Mr. Wrigley: I would like to call Mr. Soule under Rule 43 at this time. [187]

No. 10571

United States
Circuit Court of Appeals

For the Ninth Circuit.

UNION PAVING CO., a corporation, PACIFIC
INDEMNITY COMPANY, a corporation and
MARYLAND CASUALTY COMPANY, a
corporation,

Appellants,

vs.

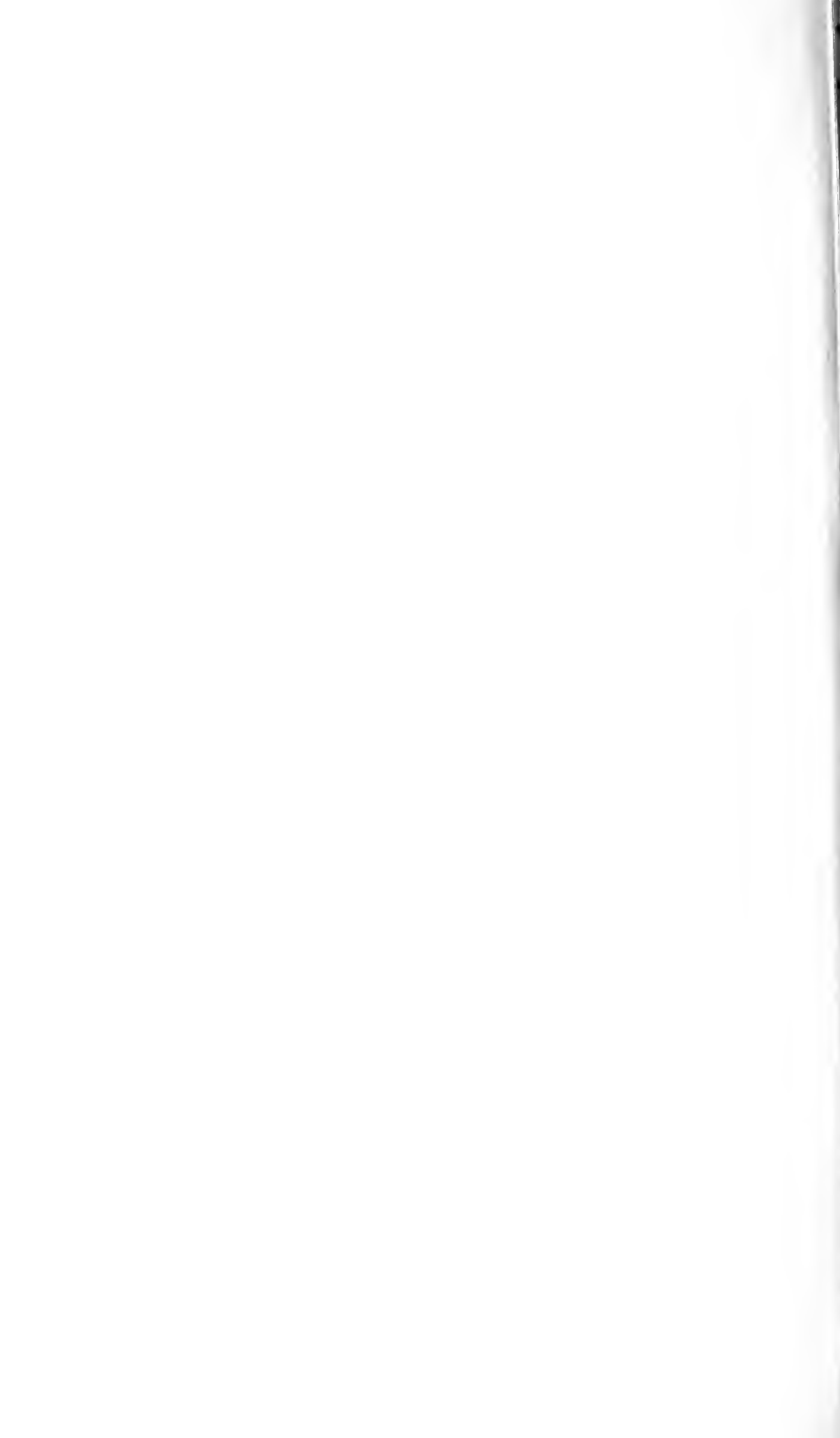
UNITED STATES OF AMERICA, for use and
benefit of SOULE STEEL COMPANY, a cor-
poration,

Appellee.

Transcript of Record
In Two Volumes
VOLUME II
Pages 333 to 541

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED
NOV - 2 1943



No. 10571

United States
Circuit Court of Appeals

For the Ninth Circuit.

UNION PAVING CO., a corporation, PACIFIC
INDEMNITY COMPANY, a corporation and
MARYLAND CASUALTY COMPANY, a
corporation,

Appellants,

vs.

UNITED STATES OF AMERICA, for use and
benefit of SOULE STEEL COMPANY, a cor-
poration,

Appellee.

Transcript of Record
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Pages 333 to 541

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

EDWARD L. SOULE,

recalled by defendant under Rule 43 of Rules of Federal Procedure; (previously sworn.)

Direct Examination

Mr. Wrigley: Q. Mr. Soule, have you with you now the records of the dates that you were on that job? A. Yes.

Q. When I say "on the job," I refer to the Pit River. May I inquire what that is that you are looking at? Is that a current memorandum that you are looking at that you have written on these dates, or was that made at the time?

A. I took these from the paid bills of the Golden Eagle Hotel, at Redding, and checked them with the P.B.X. operator's record showing the times that I was at Redding.

Q. Starting with January 6, 1940, what was the first date after that that you were up there?

A. April 7th to the 9th, 1940.

Q. Did you see Mr. Dowling there at that time?

A. Yes, I saw Mr. Dowling at that time.

Q. Did you have any conversation with him?

A. Relating to what?

Q. Anything relating to the Pit River job.

A. More than general—we went over the job. I climbed over the steel. I was particularly interested in the placing of the reinforcement steel.

Q. What is the next date that you were up there? A. On May 31st and June 1st.

Q. Did you see Mr. Dowling there at that time?

A. Yes, I did.

(Testimony of Edward L. Soule.)

Q. Did you have any conversation with him with relation to this work, or the progress of it?

A. Yes, we talked about the work. My boy, Lee, drove us up; I remember a number of different conversations that we had with Mr. Dowling.

Q. When was the next date that you were up there?

A. July 23, 1940. [188]

Q. Was that July 23rd or July 22nd?

A. My notes show July 23rd.

Q. What was that note taken from?

A. From the paid hotel bill. I have the paid hotel bills with me.

Q. Do you remember that trip up, how you went up?

A. I went up by railroad train.

Q. On what date?

A. I take it it would be on the day before.

Q. And when was your next trip?

A. September 1st and 2nd.

Q. 1940?

A. 1940.

Q. Any other trips up there during the progress of the work?

A. All of these trips were during the progress—

Q. I say any other later.

A. I don't recall that there were. I didn't check any further than these dates.

Q. Did the Union Paving Company at any time request the Soule Steel Company to install this falsework?

A. In writing, after the date that the man was killed on the job.

(Testimony of Edward L. Soule.)

Mr. Wrigley: I would ask that the last go out as not responsive.

The Court: Will you fix the date as near as you can.

A. I think that was fixed in my last testimony as October 15, 1940.

Mr. Wrigley: We will stipulate that that is correct.

Q. Prior to that date there had been no requests made to do that work?

A. No, there were no requests made to me.

Q. To you, personally?

A. Or to our company.

Q. You were not the company, were you?

A. I am the president of the company.

Q. You were just the president; they had a board of directors, didn't they?

A. That is correct.

Q. And they had other officers besides yourself, didn't they?

A. Yes, sir. [189]

Q. Mr. Thelen, of Thelen & Marrin, was a director also, wasn't he?

A. Mr. Thelen is a director.

Q. And so far as this job was concerned, Stevens was a partner, wasn't he?

A. That is correct.

Q. So you are speaking for yourself only, and not for somebody else when you say that the company received no requests; you mean so far as you were concerned?

A. There was no notice that came to the com-

(Testimony of Edward L. Soule.)

pany, and it certainly would have come to me had there been notice of such a thing.

Q. You refer to a written notice?

A. It would have come to me had it been oral or written, because I had direct charge of that particular work.

Q. You were familiar with the fact that Soule Steel Company each month was sending bills to Union Paving Company? A. That is right.

Q. You are familiar with the fact, personally, then, that they quit paying in July, aren't you?

A. I was told that they did.

Q. You were told also, weren't you, at that time, the reason that they were was they would not make any more payments until you had straightened out that falsework, the cost was to be prorated, isn't that the fact?

A. I knew there was dissension and we couldn't quite get the full reason for all of it.

Q. Starting in July?

A. The first we heard about it was October 15th.

Q. Go back to the month of July. You didn't get the pay at that time, did you, from Union Paving Company?

A. I think the records will show on that, if I had that right before me.

Q. Perhaps this memorandum will refresh your recollection (hand- [190] ing a document to the witness). Now, you had a billing for the month of March, April, May and June, and Union Paving Company made the first payment, you testified, of

(Testimony of Edward L. Soule.)

\$5000, and then you testified previously that they paid you \$12,486.25, and they did not then pay starting in July and running clear through December, is that right?

A. September 21st, 1940, \$9126.

Q. You billed them in the month of July, didn't you? A. We billed them monthly.

Q. In July you billed them for the month of June, and in August you billed them for the month of July?

A. Covering the preceding calendar month.

Q. Yes, and in August you billed for July, isn't that the fact? That is correct.

Q. And in September——

Mr. Moore: I do not think that is so. I think if you examine these, most of them are on the last of the month, if you compare these billings, Mr. Wrigley.

Mr. Wrigley: My recollection is they were dated the last day of the month, but they came out the first part of the succeeding month. That is the fact, isn't it?

The Witness: I presume that the record would come—we would have to receive the amount of tonnage placed in the preceding calendar month, and we would get that from the United States Government office, and then we would bill.

Mr. Wrigley: Q. And when you did not get the pay for the month of July, did you take it up with anybody why?

A. That would be handled by our accounting

(Testimony of Edward L. Soule.)

department, and often times contractors do not pay for a month or two, because they might be pressed for money in connection with the handling [191] of the job.

Mr. Wrigley: I ask that be stricken out as not responsive to any question.

The Court: Read the question, Mr. Reporter.

(Question and answer read by the reporter.)

The Court: Let the question and answer stand.

Mr. Wrigley: Q. Did you personally take it up with Mr. Dowling, or any representative of Union Paving Company to find out why they were not paying? A. No, personally, I did not do that.

Q. For any of those months, July, August, or September; there weren't any payments in those months, according to your statement, and I think the fact is there weren't any.

A. September there was a payment.

Q. According to the records, and according to your testimony, the first payments were \$5000, \$12,486.25, and then we jumped over to August, paid \$9126.04.

Mr. Moore: No, the first payment of \$5000 was made in July.

Mr. Wrigley: Yes.

Mr. Moore: The next payment, \$12,000 was made in August, and the payment of \$9000 was made September 21st.

Mr. Wrigley: Paid what bills?

Mr. Moore: I haven't got the breakdown, but it

(Testimony of Edward L. Soule.)

came very close to—I have got it here—it practically paid the account up to date.

Mr. Wrigley: Not according to your billing; according to your billing it paid up to the earlier date.

Q. You say the first time the matter was brought to your attention in writing was in October, September of October of that year, 1940?

A. October, on or around October 15th is the time [192] that we heard of the controversy in connection with our not supplying the falsework.

Q. And isn't it a fact that *at time* your representatives on the job started to supply not only materials but also the labor to install the falsework?

A. That is not the fact.

Q. Didn't you, on October 25, 1940, employ carpenters and others who erected falsework there, interior falsework?

A. Certainly not to my knowledge.

Q. Now, on Friday, October 25, 1940, on Pier No. 5, weren't two of your men engaged in erecting the scaffolding on one of the shifts?

A. Mr. Stevens would have to testify to that. I wasn't on the job and have knowledge of that. It would only be the record or information coming to me later that would give evidence to me of such a thing.

Q. Didn't that fact come to your attention the next day—your attention, personally, now?

A. I would have to find where I was—on or about that time I was in Washington, D.C. for quite

(Testimony of Edward L. Soule.)

an extended time—I would have to check up to find out what time I was in Washington, D.C.

Q. Mr. Stevens reported back that he had conferred with you and that you told them not to do that work; that might or might not have been correct?

A. I would have to check up the times as to where I was.

Q. Before you signed the contract of January 6, 1940 had you examined the contract in any way, or the specifications between the Union Paving Company and the United States Government?

A. Yes, I had a copy of the specifications.

Q. Now, coming back to these dates that you say you were on the job, in April, from the 7th to the 9th, May 31st or June 1st—let us take the 1st: Was Mr. Stevens there? A. Yes. [193]

Q. On the first date?

A. April 7th to 9th, yes.

Q. Now, on the second trip, which you fix as May 31st and June 1st, was Mr. Stevens there?

A. I believe that he was. That can be determined from the record.

Q. Have you any recollection of it?

A. Mr. Stevens kept a daily log on the job.

Mr. Wrigley: I would ask that that go out. I asked him if he kept any record showing whether Mr. Stevens was there or was not there on May 31st.

The Witness: His note states that "Dowling,

(Testimony of Edward L. Soule.)

Soule and I went over the job together," and I take it from that.

Mr. Wrigley: Q. That is May 31st?

A. May 31st and June 1st, and that is my recollection, that we did go over the job together.

Q. Now, we take the third date, July 23rd, 1940. Was Mr. Stevens there?

A. I would have to refer to his log to find out.

Q. Have you any recollection of it?

A. Nothing particularly at the moment comes to mind. I am rather believing that he was there. I am not certain now of that at that time.

Q. Who was the representative of the Union Paving Company, if any, that you saw there on July 23rd?

A. That was Mr. Morrisett, I think. The gentleman is in court.

Q. Now we come to the dates that you fix as September 1st and 2nd, 1940; was Mr. Stevens there?

A. Yes, he was on the job.

Q. Who was the representative or representatives of Union Paving Company that you saw there?

A. Mr. Morrisett.

Q. Showing you, Mr. Soule, what purports to be a carbon copy of a letter dated February 5, 1940, from Soule Steel Company to J. K. Welding Company, Inc., signed apparently by yourself, can you tell us whether that is a true copy of the letter that [194] you sent to the J. K. Welding Company (handing a document to the witness)?

(Testimony of Edward L. Soule.)

A. This is a carbon copy of the letter that I sent to the J. K. Welding Company.

Mr. Wrigley: Without reading the whole letter in evidence, and reading only what I think is the significant part of this letter, "When we come to the place of splicing, we then hoist the second bar, hold the top end in position against a suitable frame, which to my knowledge has not been determined from the field."

We offer that as defendants' exhibit next in order.

(The document referred to was thereupon received in evidence and marked "Defendants' Exhibit DD.")

Mr. Wrigley: Q. Showing you, Mr. Soule, what purports to be a carbon copy of a letter from the Soule Steel Company to the J. K. Welding Company, under date of March 5, 1940, and purporting to be signed by you——

A. That is correct.

Mr. Wrigley: Reading only what we consider the significant part of this letter, "If you reply favorably we would like to have you give us the letter in duplicate, one copy of which we would want to pass on to the Union Paving Company, because they are the contractors on the job and nothing can be taken up by you or by us directly with the Government."

We offer this as defendants' exhibit next in order.

(The document referred to was received in evidence and marked "Defendants' Exhibit EE.")

(Testimony of Edward L. Soule.)

Mr. Wrigley: Q. Now, Mr. Soule, one of the matters that you worked out was the matter of the lease or rent of the property at Redding where the steel was unloaded, was it not?

A. That is right.

Q. And that was not worked out in final shape until July of that [195] year, was it?

A. There was an understanding had, but we had several letters and conversations, and the final turning over of the lease from Mrs. Kay Kite to ourselves was not done by the Union Paving Company until several requests had been made by us. I think the first few payments were made to Mrs. Kite by the Union Paving Company.

Q. And you agreed for those first few months to reimburse the Union Paving Company for the agreed rent?

A. That is right.

Q. These letters, one purporting to be a copy of a letter to you and the other to Mrs. Kite, do they refresh your recollection as to when that was done?

A. These are dated July 16th.

Q. And they are correctly dated, are they?

A. I presume they are.

Mr. Wrigley: Without reading these letters in detail, just fixing the date as July 16, 1940, one is a letter of instruction from the Union Paving Company to Mrs. Kite to make the lease with Soule Steel Company, and also a letter from the Union Paving Company to Soule Steel Company enclosing a copy

(Testimony of Edward L. Soule.)

of that letter for them to make the payments to Mrs. Kite under the lease made with her.

(The document was received in evidence and marked "Defendants' Exhibit FF.")

Mr. Wrigley: Q. I am showing you, Mr. Soule a copy of a letter on the letterhead of the Union Paving Company, dated October 28, 1940, signed apparently Union Paving Company by L. W. Hunt, addressed to Soule Steel Company, Redding, and contains a notation that it was received by L. E. Stevens. Is that Mr. Stevens' handwriting?

A. This is his signature (indicating).

Mr. Wrigley: We offer this in evidence next in order, dated October 28, 1940, addressed to the Soule Steel Company, [196] reading as follows.

(The document was thereupon read by Mr. Wrigley, received in evidence, and marked "Defendants' Exhibit GG.")

Mr. Wrigley: Q. I am showing you next, Mr. Soule, what purports to be a letter on the letterhead of the Soule Steel Company, signed Soule Steel Company by L. E. Stevens, addressed to Union Paving Company, reading, "Attention Mr. L. W. Hunt," and ask you if that is Mr. Stevens' signature to that letter.

A. That is correct.

(The document was read by Mr. Wrigley, received in evidence and marked "Defendants' Exhibit HH.")

Mr. Wrigley: Q. Showing you, Mr. Soule, what

(Testimony of Edward L. Soule.)

purports to be a letter on the letterhead of the Soule Steel Company dated January 18, 1941, and purporting to be signed at the bottom of the second page by you as president, was that letter sent by you? Is that signature by you? A. That is correct.

Mr. Wrigley: Without reading this letter in evidence, but offering it for the reason that it lays the basis for certain letters which refer to this letter, Mr. Soule summarizes the billing up to that time and the payments to date, quoting certain provisions of the contract, and demands the balance then due of \$30,979.52. I offer that as defendants' next in order.

(The document was received in evidence and marked "Defendants' Exhibit II.")

(Testimony of Edward L. Soule.)

DEFENDANTS' EXHIBIT II

Los Angeles	[Emblem]	Telephone
Portland		Valencia 4141
Houston		

Soule Steel Company
Iron and Steel Products
1750 Army Street, San Francisco
January 18, 1941

Registered Mail

[Longhand notation]: Return receipt

Union Paving Company
310 California Street
San Francisco, California

Re: Agreement of January 6, 1940, be-
tween Union Paving Co. and Soule
Steel Company — Subcontract on
Pit River job.

Gentlemen:

In accordance with statements heretofore trans-
mitted by us to you, you owed us, in addition to re-
tained percentages, the following amounts under the
above agreement:

1940	
Sept. 24—Balance due—	\$ 368.50
Sept. 30—Additional amount for month of September—	10,614.38
Oct. 31—Additional amount for month of October	17,454.34
Nov. 30—Additional amount for month of November—	14,076.00
Dec. 31—Additional amount for month of December—	8,466.30
TOTAL	\$50,979.52

(Testimony of Edward L. Soule.)

On said total, nothing has been paid by you with the exception of \$20,000.00 paid on the 17th instant, leaving an amount due, to and including December 31, 1940, in the sum of \$30,979.52.

Said contract provides, in part, as follows:

“The contractor agrees to pay said subcontractor for placing reinforcement bars at the rate of \$22.50 per ton for reinforcement bars actually placed in accordance with the plans and specifications which shall be considered as full compensation for unloading, warehousing, hauling, bending and placing reinforcement bars and clamps, and doing all work necessary or incidental thereto and for furnishing all tie wire, clamps and supporting devices.”

Said agreement further provides, in its last paragraph, as follows:

“Payments are to be made to subcontractor on or about the 10th of the following month for 85% of the value of the work performed during the preceding month, and the remaining 15% to be paid thirty days after completion of said subcontractor's portion of the work.”

As you know, we have made frequent requests that the balances due to us under said agreement be paid by you. Your failure and refusal to do so constitutes failure on your part to live up to the terms of your agreement.

Demand is now made upon you that you forth-

(Testimony of Edward L. Soule.)

with pay to us said sum of \$30,979.52 due, as afore-said, under said agreement.

And you are further notified that, unless said payment is promptly made, we shall avail ourselves of all necessary remedies to recover said moneys from you.

Yours truly,

SOULE STEEL COMPANY

By EDW. L. SOULE

Edw. L. Soule

President

ELS/en

[Endorsed]: Filed 4/15/43.

Mr. Wrigley: Q. Mr. Soule, showing you what purports to be a carbon copy of a letter from Union Paving Company to Soule Steel Company under date of January 22, 1941, I ask you if the original of that letter was received by you or your company (handing document to the witness).

A. I remember of receiving the letter. [197]

Mr. Wrigley We offer this document. First I will read it.

(The document was read by Mr. Wrigley, received in evidence, and marked "Defendants' Exhibit JJ.")

The Court: We will take an adjournment now until two o'clock.

(A recess was here taken until 2:00 o'clock p.m.) [198]

Afternoon Session, April 15, 1943 —
2:00 O'Clock P. M.

The Court: Proceed.

EDWARD L. SOULE,
recalled.

Direct Examination (resumed)

Mr. Wrigley: Q. Mr. Soule, showing you a letter on the letterhead of the Soule Steel Company dated January 25, 1941, addressed to Union Paving Company, 310 California street, is that your signature at the bottom? A. Yes, sir.

Q. And that letter was sent on or about that date? A. That is right.

Mr. Wrigley: We offer this letter in evidence and ask that it be marked defendants' Exhibit next in order.

(The document was received in evidence and marked "Defendants' Exhibit KK.")

Mr. Wrigley: I do not think it is necessary to read this letter in detail at this time; it lays the foundation for the succeeding letters. It is a letter in which the Union Paving Company was asked to furnish an exact statement of their claim, itemizing their statement.

Q. I am showing you, Mr. Soule a letter on the letterhead of the Soule Steel Company, dated February 3, 1941, addressed to Union Paving Company, from Soule Steel Company, apparently signed by Mr. Stoddard. Is that Mr. Stoddard's signature?

A. That is Mr. Stoddard's signature.

Q. That letter was sent on or about its date?

(Testimony of Edward L. Soule.)

A. Yes, sir.

Mr. Wrigley: This letter is very short, so I will read the body of it.

(The document was read by Mr. Wrigley, and received in [199] evidence, and marked "Defendants' Exhibit LL.")

Mr. Wrigley: Q. I am showing you, Mr. Soule, a copy of a letter dated February 15, 1941, on the letterhead of the Union Paving Company, addressed to Soule Steel Company, from Union Paving Company, by J. W. Desmond, and ask you if the original of that letter was received (handing a document to the witness).

A. I believe I remember receiving that letter.

Mr. Wrigley: This letter reads as follows.

(The document was thereupon read by Mr. Wrigley, received in evidence, and maked "Defendants' Exhibit MM.")

Mr. Wrigley: Q. Mr. Soule, showing you a carbon copy of a letter dated March 1, 1941, addressed to Soule Steel Company, from Union Paving Company, I ask you if the original of that letter was not received.

A. I believe that is correct. A careful perusal of our file would verify it.

(The document in question was thereupon read by Mr. Wrigley, received in evidence, and marked "Defendants' Exhibit NN.")

Mr. Wrigley: Q. I am showing you, Mr. Soule, a letter on the letterhead of the Soule Steel Com-

(Testimony of Edward L. Soule.)

pany, dated February 25, 1941, addressed to Union Paving Company, 310 California street, apparently signed Soule Steel Company, by D. J. Stoddard, and ask you if that is Mr. Stoddard's signature.

A. That is his signautre.

Q. That letter was sent on or about the date it bears? A. Yes.

(The document was thereupon read by Mr. Wrigley, received in evidence, and marked "Defendants' Exhibit OO.")

DEFENDANTS' EXHIBIT OO

Los Angeles	[Emblem]	Telephone
Portland		Valencia 4141
Houston		

Soule Steel Company
Iron and Steel Products
1750 Army Street, San Francisco
February 25, 1941

Registered Mail
Return Receipt Requested

Union Paving Company
310 California Street
San Francisco, Calif.

Gentlemen:

Re: Agreement of January 6, 1940, between Union Paving Company and Soule Steel Company—Subcontract on Pit River Job

We desire to acknowledge receipt of your letter of the 24th instant in the above entitled matter.

(Testimony of Edward L. Soule.)

Referring to the first four items of alleged charges as set forth in your letter, this is the first time that you have quoted any detailed figures so that we could see what you have in mind with reference to the matter. Heretofore you have given us nothing except some vague suggestions that you would have some additional counterclaims. As to other counterclaims, you have in the past presented the same approximately monthly as the job progressed, but as to said four items you have waited until our work has been approximately 85 per cent completed.

Now that we have some tangible indication of what you have in mind, we advise you at once that under the above agreement there is no responsibility on Soule Steel Company in connection with any of said four items. Under said contract there is no obligation on Soule Steel Company to furnish any of said items and there has been no letter or conversation which has imposed any such obligation on Soule Steel Company.

Under said contract you have no right to deduct any of said charges from the amounts of money due, or to become due, to Soule Steel Company thereunder, and we again make demand upon you for the payment of said charges, the amount of which have been improperly withheld by you from us. Under the circumstances there is no good reason why we should follow the suggestion contained in the third paragraph of your letter.

Referring now to the fifth item of charges in your letter, we request that you forward to us a detailed

(Testimony of Edward L. Soule.)

statement of your invoices and charges aggregating the total sum of \$495.81. Promptly upon receipt of such statement we shall be glad to review the same and to advise you of our conclusions.

Yours truly,

SOULE STEEL COMPANY

By D. J. STODDARD

D. J. Stoddard

DJS: DL

Quotations subject to change without notice. All sales, contracts or agreements subject to strikes, accidents or causes beyond the company's control.

[Endorsed]: Filed 4/15/43.

Mr. Wrigley: Q. Showing you next, Mr. Soule, a letter on the letterhead of the Soule Steel Company, dated March 7, 1941, addressed to Union Paving Company, apparently signed by D. J. Stoddard, I ask you if that is Mr. Stoddard's signature. [200]

A. That is correct.

Q. And that letter was sent on or about its date?

A. That is right.

(The document was thereupon read by Mr. Wrigley, received in evidence, and maked "Defendants' Exhibit PP.")

Mr. Wrigley: Q. Showing you, Mr. Soule, what purports to be a letter from Union Paving Company to Soule Steel Company, under date of April 11, 1941, and bearing the note, "The original of this

(Testimony of Edward L. Soule.)

parties, and we got no place. I will stipulate to that if that is what you are attempting to prove.

Mr. Wrigley We want to show that at all times two things were uppermost: We had to keep this work going; we had an absolute time limit with a penalty, and we were trying to reach an agreement with them without going to court. All these figures and these letters show that they were trying to reach [202] an agreement. They were considering the matter, discussing it, holding conferences, and never did reach anything definite, but were always discussing it and trying to reach a settlement in the matter.

Mr. Moore: The general rule is, I think, your Honor, anything that is said or done in a matter of attempted compromise is not admissible.

Mr. Wrigley: It is not attempted compromise, at all; it is an attempted agreement on the facts—not an attempt to compromise. That is something that came up later.

Mr. Moore: I won't persist in my objection. I thought I could shorten it perhaps by some stipulation.

Mr. Wrigley: I think we are practically through here.

Q. Showing you what purports to be a copy of my letter to Mr. Thelen, of Thelen and Marrin, I ask you didn't that letter, after it was mailed to Mr. Thelen, reach you, or wasn't it shown to you?

A. Undoubtedly this went to Thelen & Marrin and formed a part of the entire case. Mr. Stoddard

(Testimony of Edward L. Soule.)

was attending to most of this at that time with Mr. Thelen's office.

(The document was thereupon read by Mr. Wrigley.)

Mr. Wrigley: Q. Now, isn't it a fact, Mr. Soule, that just ahead of the date April 22, 1942, a conference was had in the office of Mr. Thelen, 111 Sutter street, at which you were present, Mr. Thelen was present, Mr. Dowling was present, and I was present, and we attempted to go over the figures and determine what proportion, if any, was properly chargeable to Soule Steel Company and what proportion should be charged to Union Paving Company?

A. I would have to answer your question in two parts. A conference was held. As to the exact date that the conference was held in Mr. Thelen's office, I would [203] have to have some means of fixing—but a discussion, part 2—

Q. Pardon me for interrupting; we are talking about the first conference that was held, and not the later, the last conference.

A. We had two conferences in Mr. Thelen's office. That date, as I suggest, I cannot fix without going through some correspondence that I had about that time; now, in part 2, you said as to the proportion charged to each one. I don't think it was on the case of—it was not my understanding that it was on the case of what proportion we were to pay, it was a compromise not to take it to court.

(Testimony of Edward L. Soule.)

Q. No, I am talking about the first conference, now.

A. I never understood that any conference I had was on a liability claim by us in any respect. It would be money incurred in taking it to court and detracting from—and I remember Mr. Thelen saying many times that both you and Mr. Dowling ought to be fully engaged in the war effort—and goodness knows, we were so deep in building invasion barges and other smaller vessels for the Navy that we didn't want to take any time out in order to go through any period of legal procedure.

Q. Wasn't that all at the second conference when we tried to reach a compromise, and wasn't it the conference also in which you and Mr. Dowling were excused from the room and Mr. Thelen and myself did something—you don't know what, but when you and Mr. Dowling came back we then attempted a compromise figure, which was rejected?

A. The thought of Mr. Thelen and myself was always contained in the idea that we did not want to take this to court. It is our practice not to take cases to court if there is any possible way to adjust them, and to continue that thought, Mr. Thelen, being at our board of directors meeting, knew we had all the load we could possibly carry without going [204] into any lawsuits.

Q. Didn't most of that that you have in mind now take place at the second conference?

A. No, I have already said that that continuity of thought has existed all the way through, and my

(Testimony of Edward L. Soule.)

memory serves me correctly that was given at both conferences, and more emphatically and particularly emphasized at the last meeting.

Q. And the last meeting, when Mr. Thelen was present, you were present, Mr. Dowling was present, and I was present in Mr. Thelen's office, was held at a way later date, wasn't it?

Mr. Moore: Was what?

Mr. Wrigley: Q. Held at a way later date?

A. That was held at a later date, you are correct.

Mr. Wrigley: We offer this letter in evidence.

(The document was thereupon received in evidence and marked "Defendants' Exhibit UU.")

Mr. Wrigley: Q. Mr. Soule, showing you a letter on the letterhead of the Soule Steel Company, dated September 4, 1942, addressed to Union Paving Company by Soule Steel Company, apparently signed by yourself, is that your signature?

A. That is correct.

(The document was thereupon read by Mr. Wrigley, received in evidence, and marked "Defendants' Exhibit VV.")

Mr. Wrigley: Mr. Moore, have you got a copy of my letter of September 10, 1941, to Mr. Marrin?

Mr. Moore: Yes.

Mr. Wrigley: Q. Mr. Soule, showing you a carbon copy of a letter apparently written by me to Messrs. Thelen & Marrin, attorneys at Law, I

(Testimony of Edward L. Soule.)

ask you if Mr. Thelen showed you that letter and the exhibits that accompanied it?

A. Yes, sir, he did. [205]

Q. Can you tell us whether these are the exhibits? A. \$61,112.32.

Mr. Wrigley: We offer this next in order, but I jumped over a year there. This is in 1941, September 10, 1941, a letter by me addressed to Messrs. Thelen & Marrin, Attorneys-at-Law, Balfour Building, San Francisco, California; presumably they changed their office about that time.

(The document was thereupon read in evidence.)

Mr. Wrigley: With that was a copy of a letter from the Union Paving Company, addressed to me, dated September 10th, showing the total charges, first the charge against Union Paving Company, the charge against Soule, and the miscellaneous, and accompanying that is a detailed statement or breakdown in part by price of abutments 1 and 2, piers 1 and so on. We offer that as defendants' next in order.

(The document was thereupon received in evidence and marked "Defendants' Exhibit WW.")

(Testimony of Edward L. Soule.)

DEFENDANTS' EXHIBIT WW

September 10, 1941.

Messrs. Thelen & Marrin,
Attorneys at Law,
Balfour Building,
San Francisco, Calif.

Gentlemen:

Attention: Mr. Thelen.

Re: Soule Steel vs. Union Paving Co.

I enclose herewith two carbon copies of statement showing the charges by Union Paving Company against Soule Steel Company.

Attached to the letter, you will find a breakdown of the figures which, I think, is self-explanatory, as far as it goes.

If further data is desired, I shall be glad to furnish same.

Very truly yours,

HFW :jp

Encl.

September 10, 1941

Mr. H. F. Wrigley
Monadnock Building
San Francisco, California

Dear Sir:

The total cost of constructing supports for reinforcing steel, templets, spacers, falsework, runways,

(Testimony of Edward L. Soule.)

etc., for use in building the Piers and Abutments of the Pit River Bridge is as follows:

Chargeable to Union Paving Co.:

Runways	\$38,063.93		
Falsework	13,575.87	\$51,639.80	
10% Supervision	<u> </u>	5,163.98	\$56,803.78

Chargeable to Soule Steel Co.:

Temporary supports for reinforcing steel, in- cluding templets and spacers	53,486.56		
10% Supervision	5,348.66	58,835.22	

Miscellaneous charges to Soule Steel Co.:

Moving and repairs to boom	1,893.82		
Additional Miscell. charges	383.58	2,277.40	\$61,112.62

This of course does not take into consideration any assessments for liquidated damages.

Yours very truly,

UNION PAVING CO.

By AL

AL: E

(Testimony of Edward L. Soule.)

Chargeable to Soule Steel Co.:			
Temporary Supports:		Labor	
Abutment 1		\$ 2,905.64	
Pier 1		784.71	
2		5,358.26	
3		13,263.77	
4		8,417.89	
5		2,478.63	
6		2,457.19	
7		2,185.00	
Totals		\$37,851.09	
10% Supervision			\$53,486.56
			5,348.66
Miscellaneous Charges			
Moving & Repairs to Boom			\$ 1,893.82
Additional Miscell. Charges			383.58
			2,277.40
			Total \$61,112.62

[Endorsed]: Filed 4/15/43.

(Testimony of Edward L. Soule.)

Mr. Wrigley: Q. Showing you, Mr. Soule, what appears to be a carbon copy of a letter of September 9, 1942, addressed by Soule Steel Company to Mr. Max Thelen, of Thelen & Marrin, enclosing a statement which for indention has been marked "Plaintiff's Exhibit B, Frank L. Hart, Reporter," annexed to the deposition, and ask you if the original of that letter was sent with a copy of that statement? A. That is correct.

Q. I will now ask you, Mr. Soule, if it is not correct, as appears from that letter, that a statement, or this statement, or maybe several copies of it, was not received from Union Paving Company without any letter of transmittal, or anything else, but just received in the mail, as your letter indicates?

A. I don't believe I would know that, unless there was a letter [206] of transmittal attached to it.

Q. Well, in your letter you state, "Both of these statements were received from them without comment, simply saying "From: 'Union Paving Company, 310 California street, San Francisco, California' "?

A. Don't those two statements refer one to a summarization by price and one as to materials? Here is only one statement attached to this one. This one gives the price, labor, insurance, equipment, lumber, steel, and so forth.

Mr. Wrigley: Mr. Moore, have you any such

(Testimony of Edward L. Soule.)

statement as the statement to which he refers in his testimony?

Mr. Moore: No; I understand apparently they were duplicate statements.

Mr. Wrigley: The letter so states, original and a duplicate, but he thinks there was another statement.

Mr. Moore: That is the way it was turned over to me.

Mr. Wrigley: The letter from Mr. Soule indicates that there was an original and a carbon of the same identical statement. We merely offer these in evidence.

Q. First, that would be correct as to the date, on or about September 9, 1942?

A. The postmark would certainly show on that letter as to the time of receipt. This is dated September 8th. There is the postmark.

Q. Did you receive it from Union Paving Company?

A. Yes. On the back is the receipt—our stamp shows Received September 9, 1942 at 12:00 o'clock.

Q. From Union Paving Company?

A. That is correct. The letter was opened at that time.

Mr. Wrigley: We offer this as our exhibit next in order.

(The document was thereupon received in evidence and marked "Defendants' Exhibit XX.")

(Testimony of Edward L. Soule.)

Mr. Wrigley: Q. Isn't it a fact, Mr. Soule, that the conference at Mr. Thelen's office, where an attempt was made to compromise this, which failed, was following this date of September 9, 1942?

A. I have no exact way of fixing that date unless I would look up some records.

Q. Have you any record of the date of that conference?

A. The best record I would have would be to consult Mr. Thelen, because he keeps a very accurate log of happenings.

Q. You haven't any recollection on the subject, at all?

A. As to the exact date.

The Court: Do you know the date?

Mr. Wrigley: Not exactly in my mind. I think it was September 12th.

Mr. Moore: There is no particular dispute that I know about concerning the date.

Mr. Wrigley: Not the date, but I just wanted to establish that it was after that statement that we tried to compromise and settle.

The Witness: Mr. Thelen was handling the case entirely at that time, and if he asked me to come to his office, I did.

Q. But it was after this statement was furnished?

A. I wouldn't know that.

The Court: He received this statement September 9th.

Mr. Moore: I think, Mr. Wrigley, as a result of this meeting it was arranged that Mr. Stoddard, of the Soule Steel Company go down and go over

(Testimony of Edward L. Soule.)

Cross-Examination

Mr. Moore: Q. Mr. Soule, calling your attention to Exhibit WW, I will ask you, isn't it a fact that on September 10, 1941, the date of that, that you for the first time got a statement from the Union Paving Company as to what their claim was?

A. That is correct, and we transferred the statement to Mr. Thelen.

Q. They had quit paying you in October of the previous year, is that correct?

A. That is right.

Q. Or September—

A. That is the testimony that was given this morning.

Q. There was a payment at the end of the year?

A. There was a later payment of \$16,000 over and above those that were given in evidence this morning.

Q. You were examined, Mr. Soule, with regard to the stated account at the time this dispute started, and on this blueprint, [210] or whiteprint you placed there a statement of the account of Soule with the Paving Company up to September 30, 1940, is that correct?

A. This is a true statement taken right from the bills submitted and is of our own account.

Q. This shows a payment by the Union Paving Company by cash on September 21st of \$9126.04, is that correct? A. Yes, sir.

Q. And the balance at that time was some \$9537?

A. That is right.

(Testimony of Edward L. Soule.)

Q. In other words, this payment——

A. Practically balanced.

Q. Practically balanced your account?

A. Correct.

Q. So far as you know, at that time there had never been any claim made that there was any obligation on the part of the Soule Steel Company to install this interior framework? A. No, sir.

Q. Mr. Soule, when did you first meet Mr. Dowling in regard to subcontracting this job?

Mr. Wrigley: Same objection to this line of questions that was made previously.

The Court: What was the question?

(Question read.)

The Court: Answer.

A. I am not sure that I exactly understand that question. Let me go back to the beginning, which takes me back to the history coming up to the job. I suppose the answer would be properly given when I say about October 4, 1939.

Mr. Moore: Q. How do you fix that date?

A. That is the day before the bid letting.

Q. Did you have a conference with him at that time? A. I did.

Q. Where was that conference?

A. That conference was held in the Senator Hotel, at Sacramento, California.

Q. Now, who was there? [211]

Mr. Wrigley: Pardon me. For the record, it will be stipulated that this is all going in subject to my

(Testimony of Edward L. Soule.)

objection on the ground it is incompetent, irrelevant, and immaterial, and an attempt to vary the terms of a written contract?

Mr. Moore: So stipulated.

The Witness: Ross Mahon had taken a plane about noon from our office in order to gather information as to what all the contractors were bidding, and in order that we might prepare the bid to fit their construction needs.

Mr. Wrigley: I ask that that all go out as not being responsive.

Mr. Moore: That may go out.

Q. Will you just tell us what occurred in the presence of Mr. Dowling, Mr. Soule?

A. Mr. Mahon and I called upon Mr. Dowling to ascertain from him how he wanted our proposal, and he stated to us he wanted it with the supporting means, and we were to do all the things in the plans and specifications.

Q. And did you give him the figures at that time?

A. Not at the first conference. At the second conference, in the evening, after Mr. Dowling had gone to his bed, we went up to see him about eleven o'clock that night, October 4th, and gave him a bid of thirty——

Q. You do not have to go into that. What was his answer to it?

A. He said, "I believe it is high."

Q. Did that estimate include the supporting devices? A. It did.

(Testimony of Edward L. Soule.)

Q. Did you have a subsequent conference with Mr. Dowling in connection with the bidding on this work?

A. When we came back to San Francisco Ross Mahon and I went in to see him two days after the letting, which was on October 7th, and we subsequently followed that up with a letter, which we have in our files, [212] telling him that we would like to carefully look into the way in which he would like to have his bid made and we would endeavor to get our bid down in the running so that it would be satisfactory to him.

Q. What did you do in connection with that?

A. We immediately began to make estimates.

Mr. Wrigley: I object to that as incompetent, irrelevant, and immaterial, what they did out of the presence of the defendants.

A. We sent a set of plans and specifications to our Los Angeles office and asked them to give us a check estimate on what they believed to be the cost of installing this material, and the Los Angeles office made up the large print which you showed this morning, which is Pier No. 3, drawn to a particular scale, showing the reinforcing bars, as to where they are located in the pier, showing where the bars lap and weld.

Q. I will hand you a drawing and ask you if that is the drawing which your Los Angeles office prepared.

A. This is the drawing, except—

Mr. Wrigley: Pardon me. In addition to our previous objection that this is all incompetent, ir-

(Testimony of Edward L. Soule.)

relevant, and immaterial, and an attempt to vary the terms of a written instrument, there is no evidence showing that this was ever brought to the attention, in any way, of the Union Paving Company.

Mr. Moore: I will prove that as soon as I can get to it.

The Court: Proceed. The objection is overruled.

A. The drawing did not have the inside part, here, but it did have the outline of the piers, plus all of the reinforcing bars in it. All of these original marks and the outside pier, and everything, was sent up to us, brought up to us by Mr. Hogan, from [213] the Los Angeles office.

Q. Did you have any talk with Mr. Earl Stevens at that time? A. On November——

Mr. Moore: I will ask that this be marked for identification, your Honor.

(The document marked “Plaintiff’s Exhibit 22 For Identification.”)

A. On November 22nd I telephoned to Mr. Stevens and asked him to come to San Francisco, that I desired to have him figure this work.

Mr. Wrigley: I object to this. There is no connection with our client, whatever *there* office did.

Mr. Moore: I am willing that that latter part go out.

Q. You and Mr. Stevens did re-estimate the job, did you, in connection with your Los Angeles office? A. We did, yes, sir.

Q. Did you have any conference or any talk

(Testimony of Edward L. Soule.)

with either Mr. Dowling of any of his employees about the type of structure that was desired?

A. As supporting means?

Q. Yes. A. I did.

Q. With whom did you have the conversation?

A. More particularly in the early stages with Mr. Cochrane, his outside superintendent, on or about the middle of November.

Q. Did you do anything further? What did he tell you at that time?

A. Mr. Cochrane asked us how we expected to support those reinforcement bars—and a yellow pencil sketch is shown on that drawing—and when I explained to him that we expected to do that either by one of two ways, but we found the cheapest way would be to put up what we called a structural triangle that took the slant of the bars, plus a supporting member here, and then that was trussed up, against which we laid the bars——

[214]

Q. That was the method you described?

A. That was the method we described and it is outlined on that.

Q. What did Mr. Cochrane say when you explained that, if anything?

A. Mr. Cochrane said that that was not a very good way to coordinate the two contracts. If we would put in these triangular structural pieces, that would be so much expenditure of money, that they intended to put up falsework, putting up falsework to support their runways, and on it

(Testimony of Edward L. Soule.)

the workmen would run their buggies, and from which they would pour the concrete, and there would be a duplication in that way. And a discussion was had on or about that time as to getting the job entirely coordinated, because they were trying to get the very best price they could from us.

Q. Did you redraft your plans or estimates?

A. Yes, we did.

Q. Then at about the time these plans were redrafted or your estimates redrafted, did you dictate a proposed bid?

A. Well, there was a little history in there between that time. Mr. Dowling wanted us to take the welding of the steel. On November 17th or 18th we procured two-inch bars from the Columbia Steel Company, as our record shows, and Mr. Dowling and Mr. Cochrane came down to our office; we cut those two-inch bars in accordance with the specifications. They went out into our office on these two different days. We set them up in the position like they would be in the field, and we performed the welding with our welders to ascertain whether or not we wanted to bid on the welding, too.

The second day the Lincoln agent, Mr. Cunningham, brought in his expert welder and we had set up in a row several of these bars at just the distances they would be in the job, in order to see how we were going to get in to weld those, because they [215] were setting very close in there, and

(Testimony of Edward L. Soule.)

we didn't know just how much of a job that was going to be to get in, or whether we could do it, at all, because there were three sets——

Q. Without going into it, you decided not to bid on the welding, is that correct?

A. We decided we could not do it for anywhere near the price, particularly on account of the waiting time on the welders that would have to be on the job.

Q. Did you subsequently, on or about December 11th, dictate a memorandum offer or agreement? I will hand you a carbon copy of it.

A. To complete the history just a little bit on this, we had revised our price down, knowing that Murphy's price was \$30, and we had been told by Mr. Dowling and by Mr. Cochrane, both, that Mr. Murphy's price was \$30, and we had to bid that price, which price included the supporting means or falsework, or however you want to designate that. We therefore asked Mr. Stevens to come down again on December 9th—he flew down here—and we went over our estimate again and pared our estimate down to \$28.60 per ton. We took out the amount which we had calculated in for the supporting means, which was \$3.77 a ton, which made \$24.83, and dropped off the 3 cents, and I, on December 11th, dictated this letter that you have given me.

Q. Now, there has been one introduced in evidence already with a pencil memorandum on it;

(Testimony of Edward L. Soule.)

did you at any time deliver a copy of this letter to Mr. Dowling? A. Yes, sir.

Q. When, if you remember?

A. On November 20th we felt—before November 20th a little bit we felt our price then—we had reduced it down to \$24.80——

Q. Did you mean November or December?

A. Did I say November? Excuse me. December,—was in the running, and then we had to [216] coordinate as to the——

Mr. Wrigley: I object to that. The question has been asked and answered. This is not responsive to any question—in addition to the previous objections.

Mr. Moore: Q. Did you give Mr. Dowling a copy of this letter?

A. Later on we did, yes.

Q. When was it? Where was it that you gave it to him, do you remember?

A. Gave it to Mr. Dowling in my office at 1750 Army street.

Q. When?

A. Mr. Dowling came into our—Mr. Dowling and Mr. Cochrane came into our office on December 29, 1939.

Q. I may be wrong; the question may be slightly leading. You took a trip up to the jobsite with Mr. Dowling, didn't you? A. Yes, we did.

Q. When was that?

A. That was December—went up on December 20th and went over the job on December 21st.

(Testimony of Edward L. Soule.)

Q. Directing your attention to this letter, on that trip did you give him a copy of this letter?

A. I think I gave him a copy of that letter, and then I put the pencil notations on the conference of December 29th.

Q. Along about December 20th or 21st you went up and went over the jobsite with Mr. Dowling?

A. Yes, sir.

Q. And I assume you discussed the contract and the work?

A. Both going up on the train, and we were in his room in the Golden Eagle Hotel the night of December 21st, and we discussed it there.

Q. Then did you come back together?

A. Yes, we did.

Q. Then did you have a further conference?

A. We did, on December 29th.

Q. How do you fix that date, Mr. Soule?

A. Well, it was very, [217] very close to the end of the year, and in reviewing that in my mind I remember of having told Mr. Stevens that we would like to clear up this job before the end of the year, and particularly on our estimate that we revised down.

Q. On the estimate which you revised downward? A. That is right.

Q. Now, did you have a conference with Mr. Dowling on that day? A. I did.

Q. Who else was present?

(Testimony of Edward L. Soule.)

A. That took different parts.

Q. What time did you meet?

A. My son Lee and I picked up Mr. Stevens, who had flown down from Seattle and was staying at the Whitcomb Hotel. We made an engagement to meet at our office at 1750 Army street at eight o'clock. My son and I picked up Mr. Stevens at the Whitcomb Hotel, arriving at our place of business at about eight o'clock, and found Mr. Dowling and Mr. Cochrane waiting for us there.

Q. Then what did you do?

Mr. Wrigley: What date was that?

Mr. Moore: December 29th.

A. We had a short talk in my office, and then we proceeded upstairs to the engineering department, to discuss the method of the falsework which the Union Paving Company said that they were going to use for their own use, that they were required to build, which they would have runways on, and on which the workmen would wheel their wheelbarrows and pour the concrete. That was the principal subject and reason for the visit, for that discussion.

Q. You mean up to the drafting room?

A. Went up to what we call the reinforcing engineering department.

Q. This map that you identify here, was that before you at the time, Mr. Soule?

A. We took this original plan showing the [218] outline of the pier, and Mr. Alec Cochrane proceeded to tell me how he was going to build this

(Testimony of Edward L. Soule.)

inside falsework. I took the T-square and a triangle, and as he proceeded to tell me how he was going to do this, I put down the work in here. He said, "I would use a 10 by 10 with about 10 foot centers." And as he would tell me, then I would put down that work.

He told me about the pouring, of the elevations at which it would be required on account of the pouring. The specifications said in instances of big bulk work, in order that the concrete might not heat up too much, and so forth, that you had to limit them to five-foot pours.

We discussed very thoroughly the places at which each of the bars would splice, and, of course, we had to stop the pour at a workman's height in order to weld those bars. That could not be done down on their stomachs; they could be higher, but it would not be very economical. And a discussion was held as to the different welding points. This shows at all the elevations where they had to be welded, so therefore you had to stop the pouring at different places. For example, this bar came down and was broken there. Of necessity, you would have to stop the pour there. These beams came in at this elevation, and here are red marks showing the different elevations at which the pours of necessity have stopped for construction purposes.

Q. Did all this conference take place in the presence of Mr. Dowling?

A. Mr. Dowling was present at all times.

(Testimony of Edward L. Soule.)

Q. Were there any further conversations had up there about this plan of interior framework?

A. Yes, very definitely, very definite discussions, and an explanation was given, because that was the substance of our meetings. We sat down and, as I say, [219] delineated how they were going to do this for their own use.

I remember Mr. Cochrane stating to us, after we had this all delineated out there and they were leading up to the subject of the price at which we would quote on this work—and I remember that Mr. Cochrane remarked, “Now, boys, it looks like a different picture to you now, doesn’t it, that you know the type of falsework that we are going to construct for our own use?”

And then he went on to state that this falsework is to be for the use of ourselves in the pouring of the concrete, supporting these runways, and stated to us that he would in all instances turn this over to us for our own use. The explanation seemed to be very clear to us.

Q. After you got through up in the drafting room where did you go? What did you do?

A. We didn’t clear up that conference until after dinner. We stopped the conference and went to dinner.

Q. To dinner?

A. To lunch, down to Manning’s, on Brannan street. When we came back we went up there and had a further discussion over the points that were brought out in the morning, and further, Mr. Coch-

(Testimony of Edward L. Soule.)

rane explained to us after they built this inside framework, if there was any templating required, that is, if you had to bring the bars out to the exact tolerances as shown on the plans, that should be for our own account. If after they did the bracing, did the construction of this work and did the bracing, and, in our judgment, that bracing was not sufficiently strong—for example, if we desired to put more bars on one side than we did on the other for an unbalancing, then if there was any extra bracing, then that should be for our account.

[220]

Q. That was all discussed at that time?

A. We had a full and complete discussion, and present at that meeting was Mr. Dowling, Mr. Cochrane, Mr. Stevens and myself, and in the room, the engineering room, was Mr. Short, Houden, Ubigau.

Q. After you went up to the drafting room again what then happened, Mr. Soule?

A. After we had a full explanation as to how this was to be done, Mr. Dowling remarked, "Now, boys, you get your figures together on this explanation as we have shown it to you, and we will turn this over to you free of charge for your use in all instances, and Alec and I will take a walk out here and look over the housing project."

They were gone about an hour, and when they came back we went into my room, in the corner, downstairs, and Mr. Dowling said, "Well, now,

(Testimony of Edward L. Soule.)

boys, have you got that price down? What is your final price?"

And Mr. Stevens and I had again looked over our estimate in light of the explanations of their furnishing the falsework, and that estimate in the file shows we calculated, we came to \$23.60 on the basis that the Union Paving Company would furnish the falsework. We felt that we would try to get \$24, so when Mr. Dowling came back and asked us for a price, we started at \$24.

Q. What price did he offer?

A. Mr. Dowling offered us a price of \$21.50 to \$22. Finally, some horse trading went on between us, until Mr. Dowling's price had raised to \$22.25, and our price had lowered to \$22.75, and it looked like we were just in a complete deadlock, because we had dropped below our \$23.60 price. And Mr. Stevens and I had agreed we thought we were getting down to as low as we should possibly go on such a hazardous job. Finally, Mr. Stevens and Mr. Cochrane, [221] who were sitting a little bit to the back of us—Mr. Cochrane suggested, "Why don't we split the difference?" We split the difference, and that became the basis of our bid of \$22.50 a ton.

Q. At that meeting did you have a copy of this bid of December 11th? A. I did.

Q. I will hand you one. There are certain pencil interlineations in there. Whose handwriting are those in?

A. That is in my handwriting.

(Testimony of Edward L. Soule.)

Q. You saw the one that was introduced in court this morning, produced by Mr. Dowling?

A. Yes, sir.

Q. That is in your handwriting, too, is it?

A. That is a duplicate of this one.

Q. Under what circumstances was that handwriting placed on that document?

A. In other contracts it was usual that we get out the contract, and I suggested that we prepare the contract, believing that the form that we generally had there covered the conditions. Mr. Dowling said he wanted to get out the contract. So I therefore took one of these copies, and I know this was my particular copy—I scratched out the \$24.80, and I put on the things that we had agreed to. Paragraph 5 states,

“You are to provide an easy and accessible roadway from the main highway to the base of the piers and abutments as required and a leveled portion around the piers, or a wooden trestle which may be for our use.” Paragraph 8:

“You are to furnish wood supporting frame work.”

Q. That was put in there by you, was it?

A. That was put in there by me.

Q. On the back there is a 7.

A. 7 couldn't be written in that [222] part on account of the space. 7 was turned over to read,

“You are to pour concrete sills as required,

(Testimony of Edward L. Soule.)

in the base of the piers, to support the reinforcing steel mats in the bottom of the piers. On the steel reinforcing mates, the steel shoes, which support the two-inch vertical bars, are to be placed."

Q. Were those various provisions discussed between you and Mr. Dowling at the time you made those interlineations?

A. They were. It was brought right up to date and agreed to right at the time.

Mr. Wrigley: I ask that that statement, that it was brought up to date, be stricken out.

Mr. Moore: It may go out.

Mr. Wrigley: In other words, he can say what was said, but his conclusion that it was agreed to——

Mr. Moore: I made no objection to its going out.

Q. Mr. Soule, you kept one copy of that, did you?

A. Yes, this was to be the basis of the contract.

Q. Mr. Dowling took the other?

A. That is correct.

Q. He drew up the contract?

A. Yes, sir.

Q. You signed that contract when?

A. January 6th.

Q. Was it your understanding at the time you signed it as to——

Mr. Wrigley: I object to the question as to his

(Testimony of Edward L. Soule.)

understanding as calling for an opinion and conclusion.

Mr. Moore: I think it is proper. I might finish the question.

Q. Was it your understanding at the time you signed that contract that you were to put up the framework, or that Soule was to put it up, or that the Union Paving Company were to put it up?

Mr. Wrigley: It calls for an opinion and conclusion when [223] you ask for his understanding.

Mr. Moore: I think it is proper to show his understanding as to what the contract meant at that time, your Honor.

The Court: I will allow it.

A. I distinctly understood, and it was so stipulated on this written form, that they were to furnish it, and we reduced the price from \$28.60 by deducting the amount to \$24.80 and horse trading to \$22.50.

The Court: We will take a recess.

(Recess.)

Mr. Moore: I will offer in evidence at this time the contract, your Honor, which was marked "Plaintiff's Exhibit 22 For Identification."

Mr. Wrigley: Same objection.

The Court: It may be marked.

(Plaintiff's Exhibit 22 For Identification was thereupon received in evidence.)

Mr. Moore: We also offer a copy of the letter

(Testimony of Edward L. Soule.)
of December 11th produced by Mr. Soule and identified by him.

Mr. Wrigley: The same objection.

The Court: Same ruling.

(The document was received in evidence and marked "Plaintiff's Exhibit 23.")

PLAINTIFF'S EXHIBIT No. 23

Los Angeles

Telephone

Portland

Valencia 4141

Houston

[Emblem]

Soule Steel Company

Iron and Steel Products

1750 Army Street, San Francisco

December 11, 1939

Gentlemen:

Re: Abutments and Piers, Pit River
Bridge Relocation of Southern Pacific
Railway and U. S. Highway 99

In regard to the labor of installing the reinforcing steel bars, Bid item No. 11, as specified for the construction of the above project in accordance with plans and specifications prepared by the United States Department of the Interior, Bureau of Reclamation, we are pleased to quote you as follows:

1. We are to receive the reinforcing steel bars f. o. b. cars Redding, California.

2. The 2" square bars are to be bent at supplier's mill, all other bars are to be furnished in straight lengths.

3. We are to be responsible for the unloading,

(Testimony of Edward L. Soule.)

checking and handling of said reinforcing steel upon arrival at Redding upon a lot to be provided by you. [by us]* ~~(We estimate the storage lot size should be about 150' x 350' and adjoining a rail track.)~~ [rental of which shall not exceed \$30 per month.*]

4. We will do the cutting, bending and shaping of 2" bars preparatory to welding, loading on to trucks and transporting to jobsite to conform to your construction schedule.

5. You are to provide an easy and accessible roadway from the main highway to the base of the piers and abutments as required and a leveled portion around the piers [or a wooden trestle which may be for our use.*]

6. We will furnish all labor (including insurance) to do the placing of the reinforcing steel, including tie wire and accessories under above bid item No. 11 (but not including welding).

[Figure 7 in circle]

8. [are to furnish wood supporting framework*]

7. You will pour concrete "pyramids" ^ in the base of piers #1, 2, 3, 4, 5, 6 and 7 and/or will furnish and erect wood core forms and/or steel supports, against which the 2" bars can be supported. [over*]
[omit*]

8. We have provided in this proposal for a job engineer 16 months @ \$300.00 per month, which cost will be borne equally.

[*Printer's Note: Words in light brackets were inserted in copy in pencil.]

(Testimony of Edward L. Soule.)

9. Sufficient lights will be furnished by you; also power outlets will be available for our use.

Price: As specified for the above items, the unit price of \$24.80 per ton.

~~If a bond is required, the same will be for your account.~~

Payments are to be made on or about the 10th of the following month for 85% of the value of the work performed during the preceding calendar month, and the remaining 15% to be paid 30 days after completion of our portion of the work.

Note: We are not to be held responsible for failure by delay or default arising from strikes, lock-outs or other contingencies beyond our control.

If the above is in accordance with your understanding, please accept in the lower left hand corner, and it will constitute an agreement between us.

Sincerely yours,

SOULE STEEL COMPANY

By EDW. L. SOULE.

Accepted:

UNION PAVING COMPANY.

By

[Fig. 7 in circle*].

[You are to pour concrete "sills" as required, in the base of the piers to support the reinforcing steel mats in the bottom of the piers. On the steel reinforcing mats, the steel shoes, which support the 2" vertical bars, are to be placed.*]

[*Printer's Note: Words in light brackets were inserted in copy in pencil.]

(Testimony of Edward L. Soule.)

ELS:DL

Quotations subject to change without notice. All sales, contracts or agreements subject to strikes, accidents or causes beyond the Company's control

[Endorsed]: Filed 4/15/43.

Mr. Moore: I think that is all at this time.

Redirect Examination

Mr. Wrigley: Q. Mr. Soule, you were shown this exhibit, Defendants' Exhibit WW, and you stated that that was the first time that you had a statement of any amounts from Union Paving Company, is that correct?

A. Our Mr. Stoddard went down in there to the books and he handled the situation. I the rec- [224] ord of it speaks for itself in respect to the——

Q. I think the record does speak for itself, but you testified that was the first statement you had from the Union Paving Company giving figures in response to counsel's question. Now, is that correct? A. I presume that is correct.

Q. Is that correct, that you so testified, that that was the first statement that you received?

A. I think that is correct.

Q. Now, isn't it a fact that many, many months before this—nine months before—you had a detailed statement from the Union Paving Company showing the amount due at that time?

(Testimony of Edward L. Soule.)

A. In respect to your furnishing of the false-work?

Q. Yes. A. No, that is not correct.

Q. Had you ever received any statement prior to that giving the figures up to that date, the date of the statement; the work was not done, so you could not give a final statement until the work was done, but you had a statement up to the date of the statement of the work that was completed, isn't that correct, Mr. Soule?

A. Not to my knowledge.

The Court: What is it you are looking for?

Mr. Wrigley: A letter of January 11, 1941, from Desmond to Soule Steel Company, giving a statement of the figures up to that date.

The Court: Do you know anything about that, Counsel, without time being consumed here?

Mr. Moore: I do not remember. It seems to me there was a statement, a partial statement made by Desmond at one time, but I do not remember the date.

Mr. Wrigley: My record shows it in evidence. I am just wondering where it is. I will have to pass that. My record shows it in evidence, dated January 11, 1941. Where it is I [225] do not know.

The Court: Your record shows it in evidence. Does the Clerk's record show it in evidence?

Mr. Wrigley: The Clerk does not seem to have it. We have so many records here, I do not want to

(Testimony of Edward L. Soule.)

take the time. My record here shows it in evidence, the date and everything else.

The Court: Have you a copy?

Mr. Wrigley: No, the copy I have is in evidence.

The Court: It isn't in evidence, unless the Clerk took it home.

Mr. Wrigley: No, I don't think the Clerk would do that. I am more inclined to think we have it here among these exhibits, and I just can't locate it.

Q. You testified Mr. Soule that sometime—I didn't get the date from your testimony—but in October or November, or at least prior to January 6, 1940, you reached an estimate of the cost of doing certain work? A. Yes, sir.

Q. Did you compare that cost with the later cost? Have you that cost sheet with you?

A. I don't quite understand that question.

Q. Have you got the statement showing how you arrived at your cost?

A. You mean estimate of original cost?

Q. Yes.

A. Yes, we have. There are several estimates. There was what we called our going-in bid. That was prepared about—finally completed about September 29th, remembering the bid opening was on October 5th. In other words, that was a summarized statement giving up time to call on each of the contractors and to bring that into coordination with what each of the contractors were going to do and what we were supposed to do. That was

(Testimony of Edward L. Soule.)

our original bid, and then after Mr. Dowling got the job, then we [226] coordinated his handling of the work, together with what we had to do, and then we made revised estimates.

Q. Now, isn't it a fact, Mr. Soule, that omitting the interior falsework erected by Union Paving Company, the cost for doing the work that Soule Steel Company did averaged slightly less than \$6 a bar weighing 900 pounds up there on that job?

A. That is not correct, and I will explain why it is not correct, if you so desire.

The Court: You may explain your answer if you wish.

The Witness: There may be sections which would go in cheap, because the bars are very—repetitive work for a short time might make some cheap prices, but remember that you have to do unloading, you have to do unloading, you have to do the cutting and the bending and the shaping of the bars, and the putting on of clamps, receiving the clamps again, moving them on up—you have to have an indirect cost to the job, and an administrative cost that has to be added on there, and it isn't any particular cost on the job that constitutes the cost of placing those bars.

Q. The placing of the bars was done by men who received wages, was it not? A. Correct.

Q. And didn't you furnish a certified payroll to the United States Government, showing every penny that you paid out in wages?

(Testimony of Edward L. Soule.)

A. We did.

Q. And those are what you call direct costs?

A. Those are the field direct costs.

Q. What indirect costs did you have other than those?

A. You would have an indirect cost of, for example, the depreciation on two crawler cranes. You have got the electricity that goes to make up the running of your motorized equipment. You have got the hoisting, these breakages that occur, [227] and repairing, and in the general term of manufacturing or handling a job is what we call indirect—all of those intangible things that you can't put directly to labor. Then, in addition to that, is the administrative part.

Q. Did you ever make a statement up showing what this job costs? A. We did.

Q. Have you that statement with you?

A. I have not.

Q. Will you produce it?

A. If my counsel states so, we will do it.

Q. And that statement shows the direct cost and the indirect cost?

A. That is broken down into the units that were originally set up in the job.

Q. Now, did Union Paving Company ever submit any plans or drawings drawn by it, or someone for it, showing how any of the work was to be done by it up there?

A. We did in this conference, we explained just before the recess.

(Testimony of Edward L. Soule.)

Q. No, you testified those were drawn at your office by your men, but did they draw up any which they submitted at any time?

A. That would be known by Mr. Stevens, who was on the job. He could testify to that.

Q. You were present at these conferences——

A. No, I was not.

Q. I am talking about the conferences before the contract of January 6, 1940.

A. The one which I explained and we delineated on—the exhibit which you have directly in front of you—is the one that was made out prior to the signing of the estimate.

Q. By Union Paving Company?

A. Yes, that is correct.

Q. And they brought it down to your place of business?

A. No, they came to our place of business——

Q. Isn't it a fact that your testimony showed that was made up [228] by your own draftsmen and architects?

A. My testimony shows that I was at the drafting board, a long drafting table, and I put onto that drawing the information that was given to me by Mr. Cochrane.

Q. But did the Union Paving Company ever prepare any plans or drawings which they brought down there, as to how any work was proposed to be done?

A. They brought no drawings to me, but they

(Testimony of Edward L. Soule.)

delineated on the drawings that I had at my place how they were going to do it.

Q. Now, after you had this series of discussions starting October 4th and running through to December 29th, you signed a written contract to do certain work, didn't you? A. Yes, sir.

Q. And you read it before you signed it?

A. Yes, sir.

Q. And you observed that it was totally different from anything that was in any offer, isn't that a fact?

A. I didn't get that last sentence.

Q. You noticed that the contract you signed was totally different in almost every particular from any written offer that you had signed previously, isn't that a fact?

A. I noticed distinctly that many of the phrases in the letter of December 11th are identical with the ones that are in the contract. The rest of it is more in a legal phraseology, I take it.

Q. Were there any attorneys involved in this matter?

A. I understood that Mr. Dowling had an attorney in his office who worked up the contract.

Q. From whom?

A. He told me he had an attorney in his office.

Q. You did not have any contacts with any attorneys at all, did you?

A. My contact was direct with Mr. Dowling.

Q. Mr. Dowling? A. That is right.

Q. Showing you this exhibit which has been

(Testimony of Edward L. Soule.)

marked "Plaintiff's [229] Exhibit No. 23," you state that you had that and made the pencil notations on it on the 29th of December, 1939?

A. I made that statement, that is correct.

Q. And on January 6th you signed a written statement for this work? A. That is correct.

Q. Where was that signed?

A. In Mr. Dowling's office.

Q. And you read it before you signed it?

A. Yes, sir. I had previously received an outline of the contract and it omitted the strike clause. We compared the conditions with the contract, and when I went to Mr. Dowling's office on January 6th I noted that that strike clause had been inserted.

Q. Now, where was there anything in your contract, as you state, in that bid that said, "The subcontractor at its own cost agrees to provide all labor, materials, tools and equipment or other means and promptly unload all reinforcement bars from cars delivered at Redding, California, check and haul the same to the jobsite and provide suitable warehouse or other means of protection for any material requiring storage or protection—" where is there anything in your offer to show that this was to be in accordance with the provisions of paragraph 23 of said specifications applicable thereto?

A. Ours is a breakdown in detail in the way that we have many times done that, and I would answer your question, reading, "In regard to the labor of installing the reinforcing steel bars, bid item No.

(Testimony of Edward L. Soule.)

11." Then if you follow through the specifications, it tells you what you have to do relating to the reinforcement bars in respect to bid item 11.

Q. You use the term "bid item No. 11." Before you used that, you saw the specification, didn't you?

A. Yes, sir.

Q. And didn't bid item No. 11 say you were to furnish the re- [230] inforcement steel; you get no extra bid for supporting, or anything else? Wasn't that bid item No. 11?

A. That was left up to the contractor and the subcontractor as to the means as to how it was to be supported.

Q. Yes, but doesn't the contract, in Item No. 11, say that is to be included in it at no extra cost?

A. No mention is made as to how you shall do that, and that must be up to the general contractor as to the method of support.

The Court: Was that the 2-ton rails?

Mr. Wrigley: I didn't get your Honor's statement.

The Court: This item you are inquiring about.

Mr. Wrigley: Item 11 is the item under the bid which says you will furnish everything to reinstall the reinforcing rails or reinforcing bars.

The Court: When you used the word "rails" I had in mind——

Mr. Wrigley: If I used "rails," that was improper. I should have said reinforcing bars.

Q. I will ask you to read 66 and state if that is

(Testimony of Edward L. Soule.)

not the same as bid item No. 11, reinforcement bars?

A. This is the particular subsection entitled "Reinforcement bars," attached to the specifications.

Q. And which was bid item No. 11?

A. That shows right in the front of this bid item No. 11 reads—Item No. 11—Placing reinforcement bars, 10,930 pounds at—then this is carried out.

Q. So your bid, in accordance with bid item No. 11, referred to the placing of the reinforcement bars according to the United States Government specifications, didn't it?

A. It refers to the plans and specifications of the Government.

Q. You noticed also, didn't you, that the contract, before you [231] signed it, contained an express provision that the subcontractor at its own cost and expense agrees to provide all labor, materials, tools, accessories and equipment and perform and observe all the provisions contained in paragraph 66 of said specifications?

A. That is right, and having in mind our other understanding that the Union Paving Company were going to furnish the supporting, the falsework, and thus, according to their statement, they were going to give us the use of that at all times free of cost for supporting our reinforcement bars.

Q. Before you signed that contract of January 6th, you knew their lifts ran varying from 5 feet in the base to not to exceed at the greatest depth, I think it was, 10 feet in most of the piers?

(Testimony of Edward L. Soule.)

A. Yes, 10 or 15 feet, something like that.

Q. And that so far as their work was concerned they only needed scaffolding or staging enough for that amount of concrete at any time; you knew that, didn't you? from the specifications?

A. That is correct, but they said they would carry this on up to support our bars. That was our conversation and our understanding that we made on December 29th, as delineated by our plan—on the plan, and by the conferences that we had.

Q. Now, in your offer, as you refer to it, of December 11th, you wrote originally in typing, "You will pour concrete 'pyramids' in the base of piers 1, 2, 3, 4, 5, 6, and 7 and/or will furnish and erect wood core forms and/or steel supports, against which the two-inch bars can be supported." That was typed. And then the portion, "will pour concrete 'pyramids' " was stricken out and you wrote in there in pencil. "are to furnish wood supporting framework." That was in your own handwriting, wasn't it?

A. That is right, and that needs just a little explanation for clarifications, if you desire that. [232]

Q. No, that is the wording as is stated here.

A. Yes, we must clarify that, because that sentence distinctly stipulates that you shall furnish all of the wooden falsework.

Q. In your bid, but is there anything like that in the contract? The contract does not say, "You will furnish it."

(Testimony of Edward L. Soule.)

A. The contract is not concerned with detail of construction in respect to an article like that. There may be as many supporting devices, I may say, as there are different engineers, and, therefore, it can be done in many different ways, and the Department of Interior does not stipulate as to how you shall do it, but it says you must, in its final conclusion, arrive at this result.

Q. You know this contract, before you signed it, contained a provision that the contractor would construct a wooden trestle over and about the base of all pier excavations and construct wooden cores shown in the plans which may be used by the subcontractor as supplementary support for reinforcement bars?

A. That is correct. Those are our words, I think, on this December 11th.

Q. And there is totally omitted from this contract your wording as to the wooden framework; that is all omitted from here, isn't it?

A. Oh, it did go on to say that you shall make ready those piers, and that is the part that I constructed as to the furnishing of this falsework. When you make this ready and have done these things which you have agreed to on here and have built this there, it is then made ready to receive the reinforcement bars, so that the two are synonymous in my understanding.

Q. You also read the provision of this contract, "The contractor agrees to pay the subcontractors

(Testimony of Edward L. Soule.)

\$22.50 per ton for doing all [233] work necessary and incidental thereto and for furnishing all tie wire, clamps and supporting devices."

A. Let us define what supporting devices are. Supporting devices in the common language of the placement of reinforcement bars means the devices, if required, to separate this layer from that layer, or if we pour it from the base of a footing, you must hold it up by either—the word was used "dough-balls," which was a new term to me—we used it in concrete blocks or supporting members, or some form of a metallic means of holding that up. The supporting devices are the ones that hold it up, usually, from the bases or the supporting devices which holds it away from your forms. I think if you will give the complete sentence used in your specifications, and it names a considerable number of them, and then it puts in the general form of "supporting devices." And if you will look that up, which I did, in your dictionary, the devices is the one applying to the others that are mentioned previously on there, and I think you will find that the custom or practice in connection with all reinforcement bars.

Q. Mr. Soule, you have been in the business of placing reinforcement bars for many years, haven't you?

A. Since 1908.

Q. Did you ever have a job prior to the Pit River job where the reinforcing bars were placed on an incline or slope, as on that job?

A. Many instances. I built many piers and viaducts, and so on.

(Testimony of Edward L. Soule.)

Q. Yes, that is my information. And where you have, as on the Pit River job, three tiers of steel two-inch, further up two, whatever is used, wood in that case, to separate the bars, to hold them apart, do we understand that you call those supporting devices or separating devices?

A. It is a combination of both. [234] When you separate the—when you have the inside bars supported, all you have to do with the others is to separate them apart.

Q. Aren't they called separators in steel construction work?

A. They are both supporting and separating.

Q. Aren't they known also as separators in the matter of erection of steel?

A. No, because you are speaking directly of an inclined bar, and that horizontal component has to go some place, and therefore it can go no other place except against that separator, so therefore it performs a double function of a separator and a supporter.

Q. Then the inside rail or bar which is inclined is normally called a template, isn't it?

A. Yes. That template then becomes a part of the inside falsework. A template is simply an adjunct to build it out to an exact tolerance.

Q. Yes, and that template, in turn, is held in place by being affixed one way or another to interior falsework of some kind, isn't it?

A. That is right.

(Testimony of Edward L. Soule.)

Q. And the interior falsework is the real supporting device to hold that steel up, isn't it?

A. It might be attached to the outside, too.

The Court: Time for adjournment. We will adjourn until tomorrow morning at 10:00 o'clock.

(Thereupon an adjournment was taken until tomorrow, Friday, April 16, 1943, at 10:00 o'clock a.m.)

[Endorsed]: Filed April 16, 1943. [235]

Friday, April 16, 1943—10:00 O'Clock A.M.

EDWARD F. SOULE

recalled.

Redirect Examination (resumed)

Mr. Wrigley: Q. Mr. Soule, yesterday you were shown this exhibit, which has been marked "Defendants' Exhibit WW," dated September 10, 1941, and you stated in reply to that that that was the first statement you had from the Union Paving Company giving the figures as to their charges. That was your testimony at that time, was it not?

A. I believe that is correct. I think in the general policy of this, for clearness, I think I also said the records would take care of themselves, would speak for themselves. The first known thought that we had in connection with charges for the falsework part was on or about October 15, 1940. Then there

(Testimony of Edward L. Soule.)

seemed to have been the thought that we were to be charged with the falsework.

Q. Showing you Defendants' Exhibit Y, which was February of 1941, and which purports to be a statement of the charges up to January 11, 1941, and which you testified was received by Soule Steel Company, isn't that correct?

A. I said that I presumed this was received.

Q. So as of that date, then, Soule Steel Company had a statement of the charges up to January 11, 1941?

The Court: For this falsework?

Mr. Wrigley: For this falsework.

The Court: Read it.

Mr. Wrigley: Does your Honor want the whole letter, or just **that portion?**

The Court: The portion that you rely on.

Mr. Wrigley: (Reading) [236]

"We herewith submit the apportionment of the charges due from you for this work covering the period from January 31, 1940 to January 11, 1941, namely:

"Furnishing labor and materials, hauling, installing, moving and re- installing boom for hoisting and placing reinforcing steel and ma- terials for structures,			
	\$	667.82	
Plus 10% overhead		66.78	\$ 734.60
<hr/>			
"Furnishing labor and materials and installing electric hoist, with com- munication signal systems for same, and maintenance			
	\$	73.78	
Plus 10% overhead		7.38	81.16
<hr/>			

(Testimony of Edward L. Soule.)

"Furnishing labor and materials for the construction of falsework and supporting devices necessary to hold reinforcing bars in place			
	\$	35,560.58	
Plus 10% overhead		3,556.06	39,116.64
<hr/>			
"Furnishing additional guy lines necessary to support added load of boom, including sales tax			
	\$	552.70	
Plus 10% overhead		55.27	607.97
<hr/>			
"For invoices heretofore forwarded to you for charges other than the above			
	\$	454.91	
Plus 10% overhead as billed		40.90	495.81
<hr/>			
			\$41,036.18"

The Court: What is the date of that?

Mr. Wrigley: The date is February 24, 1941.

Q. So on February 24th, or thereabouts, you did receive a detailed statement?

A. I don't call this detailed; I call this your general—I would call this a general billing leading up to what we might call a settlement on your part as to our taking a part of that apportionment. The detail was gone into by our Mr. Stoddard when he went down into your office, to the office of the Union Paving Company.

Q. Can you fix the date Mr. Stoddard went down there for the first time to go over any figures?

A. I would have to refer to the record for that. [237]

Q. Isn't it a fact that Mr. Stoddard did not go

(Testimony of Edward L. Soule.)

down there to look over the books and verify the correctness of the figures until after the statement one year later?

A. I presume you are about right on that.

Q. And Mr. Stoddard did not go down there to check any figures in 1941, the early part of that year? A. I think you are correct.

Q. Your testimony yesterday to the effect that you never had any statement of any kind quoting figures or charges from Union Paving Company prior to the statement of September 10, 1941 is not correct?

A. These would be very nebulous in our mind as to what they were about. They were quite a surprise to us.

Q. They were figures, weren't they, showing the amount of their demand?

A. Nothing that we could get our hands on, because we had nothing to do with that construction during the time that it was constructed. Just to give those figures out to us was placing us at quite a disadvantage to know what they were all about.

Q. Nevertheless, prior to September of 1941, they gave you figures and showed you the amount of their demand, didn't they?

A. It didn't mean very much to us.

Q. They gave it, though, didn't they?

A. If these letters were received, they were then in our possession and the record must stand if we have received those.

(Testimony of Edward L. Soule.)

Q. Do you mean that you received them?

A. No, I think I said that we received those.

Q. Now, look at the Exhibit OO, acknowledging receipt of it.

A. Yes, this is Mr. Stoddard's signature.

Q. So you did receive them at that time?

A. That is right. [238]

Mr. Moore: What is that?

Mr. Wrigley: OO, which is the acknowledgment of the receipt of that by Mr. Stoddard.

Q. Mr. Soule, you produced yesterday a roll of papers, which have been marked Plaintiff's Exhibit 22. Have you the manilla drawing that was made in your office in the presence of Mr. Dowling? I withdraw that statement. After you had a small rough sketch, you then prepared in your office on manilla paper large scale drawings made by your draftsman. Have you those in court?

A. I think there is an inaccuracy in connection with that. What we do is to put down a piece of manilla paper on top of our table to work on, and this is the one, the one that you have, that was used to do that work. We had no manilla lay-out on it. This was the one that was sent from Los Angeles and the exact one we did the work on.

Q. Who made up this drawing?

A. An engineer by the name of Mr. Cramer, in our Los Angeles office, made the original skeleton lay-out of the pier, and put in the bars. The rest of it was done by me, personally.

(Testimony of Edward L. Soule.)

Q. You haven't a large-scale drawing on manilla paper?

A. No, no, that is— I say again the draftsman's procedure is to put down a piece of manilla paper. Then that color shows through this piece, here, and that is probably why it was thought to be manilla paper. This is the exact and the one that we worked on.

Q. Isn't it a fact that the only drawing on large scale in the drafting room in your office, in the presence of Mr. Dowling, on which any notes or sketches were made, relates to, we will say, the 10 by 10's that were then being discussed, related 10 by 10's only in the base of the piers?

A. No, that is not [239] the case. That shows these were extended all the way up.

Q. And this, you say, was the drawing that you had at that time?

A. That is the exact drawing, yes, sir.

Q. What date did that come back from Los Angeles?

A. That came back—that was brought up to us by Mr. Holcomb when he came up—I will try and fix the date about the time we received that—came up somewhere between November 4th and November 12th—say November 4th and November 14th—because Mr. Holcomb went on the job with Mr. Stevens on November 16th or 17th.

Q. You fixed the date of the conference at Sacramento as November 4th?

Mr. Moore: No, that is not correct.

(Testimony of Edward L. Soule.)

The Witness: October 4th, the day before the bid-letting, which was 10:00 o'clock in the morning of the 5th.

Mr. Wrigley: Q. You fixed, you say, first a conference in the day time and then a later conference in the night?

A. A conference in the evening.

Q. Where did the first conference take place?

A. In Mr. Dowling's room. We were all stationed in the Senator Hotel. He had a room. We looked on the register and found what room he was registered in, and we went in to see him in his room.

Q. Where did the second conference take place?

A. In his room. He had gone to bed.

Q. Is your recollection clear on that?

A. I don't get your question.

Q. Is your recollection clear on that?

A. Yes, sir.

Q. Isn't it a fact that you and Mr. Mahon casually ran into Mr. Dowling in the lobby of the hotel and asked him if you [240] might submit a figure?

A. That might have been a bare possibility, but that is not my recollection of it. I am positive on the second one Mr. Dowling was in the room.

Q. Late that night?

A. And he explained he would save his energy a little bit by lying down in bed.

Q. And that was almost midnight, wasn't it?

A. I would guess it was about 11:00 o'clock. We had many people to see and I didn't keep track of the time within a half hour.

(Testimony of Edward L. Soule.)

Q. Now, coming to this drawing again, which you said was prepared in Los Angeles and sent up to your San Francisco office——

A. Prepared in outline.

Q. How do you fix the date?

A. That it was sent to us?

Q. Yes.

A. I fixed the date because I had previously sent a set of plans and specifications very promptly after the letting of the contract to our manager, Mr. Dawson, in Los Angeles, and they prepared the estimate——checked our estimates of quantities——and we desired a check estimate on our figures, and in making a check estimate on the figures they prepared this drawing, which Mr. Holcomb brought back with him. I called for Earl Stevens to come to San Francisco on September 4th. He was to our office between September 4th and September 14th, and then they went upon the job.

Q. What quantities do you refer to, quantities of what?

A. That is the quantities of reinforcement bars, in the different locations of the job. We divided it up into the base of the piers, and then we took three lifts on up to each one in respect to cost.

Q. Any other quantities drawn off?

A. We were figuring on the cost of the reinforcement bars.

Q. Weren't all those quantities shown on the plans and specifica- [241] tions——

A. No, they were not.

(Testimony of Edward L. Soule.)

Q. And summarized in the call for bids?

A. They were not.

Q. You read the plans and specifications over before that date?

A. Yes, sir. The total quantity given was about 5500 tons, but that was not segregated into the different component parts of the job.

Q. Do you know Harry Dohrman?

A. Yes, sir.

Q. He was an architect, or just a draftsman?

A. He was an architectural draftsman with our company.

Q. Isn't it a fact that on the 17th day of November he, in your office, in the drafting room, drew up plans on this work so far as the reinforcing steel was concerned?

A. Applying to what part of the work?

Q. The reinforcing steel part of the work.

A. He did not.

Q. What date did he prepare any plans for reinforcing steel?

A. There were no plans. The Government got out the plans. The Government shows all of the plans in the attachments to the specifications; a complete set of plans is given there. That is a function for the Government. We could only interpret and take apart for our use in calculation the plans of the United States Government.

Q. This set of plans was not prepared by the Government, was it?

A. That is only one plan made by our office.

(Testimony of Edward L. Soule.)

Q. Yes.

A. That is not complete in any sense in connection with that particular pier. Only the 2-inch bars are shown on that, and only portions of the two-inch bars.

Q. Now, didn't Mr. Dohrman, your draftsman, on November 17th, prepare a like drawing to that on manilla paper?

A. I think you have reference to a profile drawing of the piers, which was prepared on or about that time to show the elevations, an en- [242] larged profile from which we made a study of the job.

Q. And that was made by your Dohrman on November 17th—

A. I do not recollect by whom that was made. We had one for study made out to show distances and elevations.

Q. And wasn't that the only drawing that was in your office at any time that Mr. Dowling was down there?

A. That is not correct.

Q. Have you that profile drawing that Mr. Dohrman made?

A. We might have it, but I would have to search our files for that.

Q. Have you had any occasion to see it since then?

A. I have had no occasion—we had it up on our—we had it upon our wall and put in red color as the steel was placed and the concrete was poured, in order to watch the releases of reinforcement bars to enable us to keep the job going well.

(Testimony of Edward L. Soule.)

Q. Wasn't that drawing a drawing that was used down there at the time Mr. Dowling was down there, when you were talking about the figures and how the steel would be placed?

A. That was put up on the wall and reference was made to that drawing in respect to the height of the piers, and whether they were going to construct a bridge across the river, and so forth, to try to develop how they were going to do the work in the field.

Q. When was that taken off the drafting table and put on the wall that you speak of?

A. We took it off the drafting table and put it on the wall in relation as to where we could best use it.

Q. That was at a later date that that was done, wasn't it?

A. My memory is it hung on the wall when they were——

Q. When Mr. Dowling was there?

A. That is correct.

Q. That particular profile, as you call it, shows that the false- [243] work or framework interior in wood was only in the base, so far as Union Paving was concerned at that time, wasn't it?

A. There was no falsework shown on that drawing. That was entirely a profile drawing to make a study of the job. It showed no falsework or any other details.

Mr. Wrigley: No further questions of this witness.

(Testimony of Edward L. Soule.)

Recross-Examination

Mr. Moore: Q. Mr. Soule, you fixed a date at the time Earl Stevens came down there as September 3rd or 4th. Are you correct in that?

A. November. Excuse me. I am speaking of November. It had to be after the Letterman job. I am incorrect on that. I stand corrected.

Mr. Moore: That is all.

Mr. Wrigley: Mr. Stevens.

LESTER EARL STEVENS,

was called as a witness on behalf of defendants under Rule 43 of Federal Rules of Procedure; sworn.

Mr. Wrigley: I am calling Mr. Stevens under Rule 43.

The Clerk: Q. Will you state your name?

A. Lester Earl Stevens.

Direct Examination

M. Wrigley: Q. I believe the previous testimony and statements of counsel were to the effect that you were a partner with the Soule Steel Company on this particular job; that is correct, isn't it?

A. Yes, sir.

Q. Starting with the date on that contract, January 6, 1940, give us the periods of time that you personally were on that job.

A. I left Seattle on January 9th and I stopped at Redding, and then came on through to San Fran-

(Testimony of Lester Earl Stevens.)

cisco, and returned to Redding [244] about the 15th of January, 1941. I was there until the latter part of May, and I took two or three weeks and went to Seattle while Mr. Sparling was on the job. I returned and was there practically constantly until February 18, 1941.

Q. That took you up to February 18th, 1941. The job was not complete at that time, was it?

A. Not quite complete.

Q. From February 18, 1941 you were away?

A. February 18th I went to Seattle.

Q. After that were you on the job? A. No.

Q. Then you were on the job starting with June of 1940, roughly, to February 28, 1941, covering that period, then? A. Yes, sir.

Q. You knew Mr. Morisette? A. Yes, sir.

Q. And you saw him more or less every day, didn't you?

A. Yes. Let's see. Mr. Morisette came on the job, I think, in July, the latter part of June.

Q. He came the latter part of June, didn't he, while Mr. Cochrane was still there?

A. Yes, sir.

Q. You had many conversations with him after that while you were there, from the time he came in June, or whatever time he came, until you left the following year, in February? A. Yes, sir.

Q. Isn't it a fact that almost continuously from the time that Mr. Morisette took charge, there, until you left he was complaining about delays by the Soule Steel Company?

(Testimony of Edward L. Soule.)

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(Testimony of Lester Earl Stevens.)

A. No, I wouldn't agree to that.

Q. Wasn't he, we will say, in the month of August, 1940, making complaints to you about the fact that the work was not progressing because you were not erecting the reinforcing steel?

A. We may have had discussions on certain units, but we had to have time to do our portion of the work. [245]

Q. It is a fact, isn't it, that he was complaining about your holding it up?

A. The question was mentioned that they were waiting on us at certain portions of the work.

Q. And isn't it a fact that it got so bad, by the month of September, that he not only complained to you, personally, but he wrote to the head office in San Francisco a written report complaining about you holding up the job, and that was in turn referred back to you by Mr. Soule?

A. That may have been.

Q. And almost continuously from September on he was making, or Mr. Hunt was making written demands and requests to speed up that work?

A. I don't remember more than one.

Q. Which one do you remember?

A. Mr. Morisette wrote a letter to—I don't remember whether it came to our office in San Francisco and returned back to me, or whether it came direct to me, but that is the one letter I recall.

Q. That was in September, 1940, wasn't it?

A. I don't remember what date that was.

Q. And didn't thereafter his complaints get so

(Testimony of Lester Earl Stevens.)

bad that they served on you, and you signed, receipted for, an absolute written demand that you proceed when you were working on Pier 5?

A. That was after October 15th, along about the 25th, 20th to 25th.

Q. And following on from that time until you left in February, wasn't Mr. Morisette continuously complaining about the fact that you were not cooperating and erecting the steel? A. No, no.

Q. Isn't it a fact that both Mr. Morisette and Mr. Hunt demanded that you go ahead and place the reinforcing steel on both Pier 4 and Pier 5, and you said, "It can't be done, because there is no falsework to lean the steel against"?

A. That was taken up with San Francisco, and I was not in a position to go ahead [246] until I was O.K.'d by the home office.

Q. But Mr. Hunt and Mr. Morisette made that demand of you, didn't they?

A. That was late in October.

Q. Now, isn't it a fact that at that time you—when I say "you" I refer to the employees of the Soule Steel Company—actually furnished the labor and erected some interior falsework or scaffolding there?

A. Pardon me. Which pier are you referring to now?

Q. 1940.

The Court: The question was, "What pier are you referring to?"

Mr. Moore: The period.

(Testimony of Lester Earl Stevens.)

Mr. Wrigley: Is he saying "pier" or "period"?

The Witness: Pier—which one of the piers?

Mr. Wrigley: Q. The date October 25, 1940 and the pier was Pier No. 5.

A. Yes, there was considerable disturbance on the job just at that time, and Mr. Soule was in Washington, as I remember, and some of them had one or two men working on that pier. Now, whether they were working on framework or bracing—it was just until we got word back from the San Francisco office.

Q. How much of a crew did you have on the job at that time?

A. I would say there was possibly fifteen to eighteen men.

Q. Now, isn't it a fact at that time you had only six men up there? A. On the job?

Q. Yes, working erecting steel, or any other physical work on the ground.

A. No, there was more than that if there was work to be done.

Q. Have you the records on your payroll on the date October 25, 1940?

A. I think I could locate it. I don't have it with me, [247] personally.

Q. Isn't it a fact that on that date, Friday, you had two men only placing steel on Pier 3 for four hours and three men for the full time, eight hours, that on Pier 5 you had two men erecting scaffolding for one full shift of eight hours?

(Testimony of Lester Earl Stevens.)

A. I would have to check my records in order to answer that.

Q. What do you mean, you would check your records here in court?

A. I would have to check the daily time sheets.

Mr. Wrigley: We would ask this witness to check his payroll showing the number of men on that day and see whether they furnished correct sworn reports to the Government. I will ask them to produce that this afternoon.

Q. Now, didn't Mr. Hunt and Mr. Morisette both ask you personally to install that falsework to hold up your steel?

Mr. Moore: I think your question is indefinite. When?

Mr. Wrigley: He can answer for the whole period and then we will fix the time afterwards.

A. No, I wouldn't answer it that way.

Mr. Wrigley: Q. Would you say that Mr. Morisette never at any time asked you to install the interior falsework there?

A. That was discussed after October 18th.

Mr. Moore: Pardon the interruption. 1940?

The Witness: 1940.

Mr. Wrigley: Q. You say it was discussed. Who had that discussion?

A. Mr. Dowling, Mr. Morisette, and I don't remember Mr. Hunt being with us.

Q. And yourself? A. Yes, sir.

Q. Where did that discussion take place?

A. On Pier 6.

(Testimony of Lester Earl Stevens.)

Q. Didn't you at that time agree to go ahead and do that falsework? A. No. [248]

Q. And didn't you after that proceed to do it and have your men do it? A. No.

Q. And didn't you have these orders countermanded later from the San Francisco office to stop doing it?

A. No. The only time we worked on it was on Pier 5 on October 25th, until we got word back.

Q. After you had the conference with Mr. Dowling and Mr. Morissette, didn't you that same night come to San Francisco?

A. I don't remember.

Q. Do you remember that after coming to San Francisco you phoned back the next day to Mr. Klein and said that you had had a conference with Mr. Soule and that Soule Steel Company was not going to do that falsework inside and instructed Mr. Klein to take the men off the job that were doing that work?

A. Those instructions may have been given; I wouldn't know the exact date without checking.

Q. Showing you first an exhibit marked Defendants' A, I ask you if that correctly depicts the job and refreshes your recollection as to the appearance of that particular pier, which is Pier 4, at the elevation shown? A. Yes, that looks correct.

Q. Showing you Defendants' Exhibit B, purporting to be Pier 4, I ask you if that does not refresh your recollection as to the appearance of Pier 4 at that elevation. A. Yes.

(Testimony of Lester Earl Stevens.)

Q. Now, referring specifically to what I denominate the separators holding the two bars of steel apart, had that any connection whatever with the pouring of the concrete?

A. When you call it separators, now, which portion are you referring to?

Q. These separators up here (indicating)——

A. Spacers.

Q. You call them spacers?

A. Spacers, yes.

Q. Were they used in the pouring of the concrete?

A. Just to [249] keep the bars spaced while they were pouring.

Q. Not to pour the concrete; to keep the bars of steel spaced? A. That is correct.

Q. Looking next at what I would call the template—— A. Yes, sir.

Q. Against which the bars lean, was that used in any respect, whatsoever, so far as the pouring of concrete was concerned, except to hold up the bars?

A. No. You may have fastened to it at times, but principally to support the steel.

Q. Leading from the falsework inside out to the template there are various braces shown on this Exhibit B. Do they serve any purpose, whatsoever, in the pouring of the concrete?

A. No, they were just put there for stiffeners.

Q. And they were all put there by the Union

(Testimony of Lester Earl Stevens.)

Paving Company and they did furnish the material as well as put them in there, didn't they?

A. We placed them templates ourselves—any braces running out, stiffeners—and we sometimes used Union Paving Company carpenters to put them on, and in some instances we used our own men, or put their men on our payroll. That was all approved, those charges for those templates.

Q. The Union Paving Company employed carpenters who put those templates into place, didn't they? A. Yes, they did.

Q. And other carpenters also put in these braces, didn't they?

A. On that particular brace you are pointing to, There, I rather think we put that on.

Q. When you refer to "we"—

A. Soule Steel.

Q. What class or character of men employed by Soule Steel Company would do that type of work?

A. Steel workers.

Q. Steel workers did the carpenter work, then, on this job?

A. In some instances they did. [250]

Q. Showing you again the exhibit, Defendants' Exhibit A, Pier 4, which purports to show the tops of steel at elevation 903, the next tier of steel at 893, and below that is marked an elevation 863, tell us if there is any concrete work being done at those elevations.

A. At elevation 863 I think your runways is on this elevation.

(Testimony of Lester Earl Stevens.)

Mr. Moore: Will you speak a little louder?

The Witness: On elevation 863 the runways for the concrete is on that elevation as it appears there in the picture.

Mr. Wrigley: Q. In other words, at elevation 863 would be the runways where the concrete is first received from the tower inside, from which it is then taken to a lower level, is that right? A. Yes.

Q. Above the elevation 863 was there any concrete work at all going on in that picture?

A. Your equipment would be hoisted in over that and lowered down through. You had men working up on those higher elevations.

Q. Men doing what?

A. Handling equipment down in to pour the concrete.

Q. What type of equipment do you refer to?

A. Well, elephant trunks, chutes, various equipment that was brought in. It had to come in over the top.

Q. Weren't they already in there at the bottom and in use all the way up as you went up?

A. As I remember, they were taken out and moved from one pier to the other in many cases.

Q. In most cases, isn't it a fact that once you started a pier, they stayed in there until the pier was done? A. No, no.

Q. How often would you say that any of the so-called elephant trunks were taken from Pier 4 to any other pier?

(Testimony of Lester Earl Stevens.)

A. Pier 4 was one of the last piers poured, and that was practically a continuous pour.

Q. And was the biggest pier there, too, wasn't it?

A. Yes, sir.

Q. This picture is a picture of Pier 4, isn't it?

A. Yes.

Q. Do you have any recollection of the elephant trunks or the track ever having been taken out of Pier 4 to any other pier?

A. Not on pier 4. As I said, it was the last pier that was being poured, the only pier they were pouring on. No reason to take it out.

Q. I believe you have heard the previous testimony showing the total tonnage as something in excess of 5000 tons of reinforcing steel that went into the entire job.

A. Yes, sir.

Q. Can you tell me what proportion of what went into Piers 3 and 4 alone?

A. Between 3500 and 4000 tons.

Q. As a matter of fact, not only were they the biggest piers—when I say the biggest piers I refer to the height from top to base—but they had the greatest amount of steel as far as the number of rows in the base also, didn't they?

A. Yes, sir.

Q. Isn't it a fact also that in the base of most of those piers the concrete was poured only five feet at a time, and as you got higher up the greatest pour was only 10 feet at a time, the pour of the concrete?

A. Yes, I think when we got up near the top the pour was greater than 10 feet.

(Testimony of Lester Earl Stevens.)

Q. On which pier?

A. On 3—I wasn't there when the last of the pour was made.

Q. Were you ever there when a pour of more than ten feet at a time was made?

A. I wouldn't swear to that. I know on some of the piers the Union Paving Company poured more—I think 20 or 23 feet.

Q. What pier would that be on which 20 feet at a time was poured? [252]

A. Pier 2 was a very high pour that we made.

Q. In other words, that is one of the piers on the south side of the river?

A. Yes, sir.

Q. Have you in mind similar pours in any other pier?

A. No.

Q. But you have in mind they poured 20 feet at a time in Pier 2 starting at what elevation?

A. That was near the top. It may have been the last pour.

Q. Leave out that last pour, there, on Pier 2. Do you know of any time that they poured more than 10 feet at a time?

A. No, I couldn't say as to that. We would have to check the log on the pours to get what the piers were.

Q. A government inspector was on the job all the time, wasn't he, to see how much they poured?

Mr. Moore: I am going to object to that question, your Honor. I do not see the point in all this examination.

Mr. Wrigley: The point is this: If we could

(Testimony of Lester Earl Stevens.)

only pour concrete 5 to 10 feet at a time, there was no necessity for us to build a falsework 60 to 100 feet in the air.

The Court: Is the log here of the pours?

Mr. Wrigley: Mr. Dowling says it is.

The Court: Then why waste time?

Mr. Wrigley: Only to see the recollection of this witness under 43, which gives us the right of cross-examination.

The Court: If you want to know the pours, the log is here. It is not challenged by anyone. It speaks for itself.

Mr. Wrigley: Q. Referring again to Defendants' Exhibit A, Pier 4, and referring to the elevation 863 feet, weren't the pours only shallow at that point?

A. I don't know what the pours were, what the elevation between the break in the pours was at this particular place. [253]

Q. In Piers 3 and 4, picking those out, which you figure as being 3500 to 4000 tons, which can be assumed as an estimate——

Mr. Moore: Is that tons?

Mr. Wrigley: Tons.

Q. That steel extended in the air at times above the concrete 60 to 100 feet, didn't it?

A. I wouldn't say to 100 feet, no. I am satisfied it was never over 80 feet.

Q. What are the lengths of the steel bars there?

A. 60 feet was the maximum length.

(Testimony of Lester Earl Stevens.)

Q. Wasn't it the practice on Pier 4 to start placing the reinforcing steel just as fast as the welding 60 feet below was done?

A. Just as soon as we could get in on it.

Q. And two times 60 to 120, isn't it?

A. There was never two 60's above the pour.

Q. As fast as they welded a 60-foot bar, you immediately erected, or shortly thereafter, another 60-foot bar above that?

A. Never two 60-foot bars above the concrete, to my knowledge.

Q. Taking approximately half way up as being an average on Pier No. 4, there were two rows of 2-inch reinforcing bars, weren't there?

A. On Pier 4?

Q. On Pier 4.

A. I think we had three rows going all the way to the top on Pier 4.

Q. Are you sure of that?

A. Well, I would have to look at the plans before I would change my statement.

Q. It is your recollection there were three rows clear to the top of two-inch bars on Pier 4?

A. On two sides.

Q. Two sides? A. Two sides fo the pier.

Q. Which sides do you refer to?

A. The north and south sides.

Q. Which do you call the north and south sides—the sides adjoining the river and away from the river?

A. Yes. [254]

(Testimony of Lester Earl Stevens.)

Q. In other words, the two wide sides?

A. Yes.

Q. And taking two rows on two sides, then, and three rows on two sides made a total tonnage at a given elevation, if they were 60-foot bars, of how much?

A. How much for a 60-foot lift, do you mean?

Q. Yes.

A. I would have to figure that out, because I do not know the number of bars that was in there.

Q. Each one of those bars, if they were 60 feet long, weighed 900 pounds, didn't they?

A. If I remember right, it was 810 pounds.

Q. 810 pounds for a 50 or a 60?

A. 60. It may have been 910. I wouldn't swear to that without figuring.

Q. You cannot say the total weight of a complete circle of reinforcing steel half way up on Pier 4, then?

A. No, not without figuring.

Q. Did you ever figure it?

A. Not at that elevation. Around the base of the piers, I think we have some figures on that.

Q. Did you ever figure the stress on those bars that had to be supported by something to hold them up?

A. No.

Q. They would not hold themselves up, would they?

A. No.

Q. Now, there has been reference to the Chicago boom. The Chicago boom was the property of the Soule Steel Company?

A. Yes, sir.

(Testimony of Lester Earl Stevens.)

Q. And its primary function or purpose there was for use in raising the steel bars?

A. No, I wouldn't say that, because we used it eight hours a day, and Union Paving used it sixteen in the majority of cases. When they were not pouring concrete, they were using it continually.

Q. What were they using it for?

A. Hoisting of their forms, equipment, tools, placing of their forms and stripping them.

Q. Referring again to Defendants' Exhibit B—it only shows a [255] part of it—this is the Chicago boom in question, isn't it?

A. Yes, sir.

Q. In other words, it would be attached to the lift tower built by Union Paving Company?

A. Yes.

Q. You went upwards, and as you went upwards with the steel, the boom had to be raised, didn't it?

A. Yes.

Q. And very often the men of the Union Paving Company requested to and did raise it, didn't they?

A. Yes, sir.

Q. And it was their men, usually, and not the Soule Steel Company, that would raise that boom?

A. Yes.

Q. You do not remember coming to San Francisco on October 25, 1940, and then phoning Mr. Klein the next day, October 26, 1940, not to install any more falsework?

A. I would have to check the dates on that, but I know there was a telephone call in connection with that.

(Testimony of Lester Earl Stevens.)

Q. Was it necessary at any time to have a platform to pour concrete very much higher than the top of the concrete as being poured?

A. It was more economical, because you didn't have to put in a platform for every pour.

Q. It is more economical to build a 60-foot platform or an 80-foot platform than it is a 10- or 12-foot platform?

A. I didn't understand your question the first time, then. When your falsework is in you do not have to put a platform on every elevation.

Q. Assuming there was no falsework in there, at all, that Soule Steel Company had some other means of supporting that steel, would it be cheaper for Union Paving Company to build a 60- or an 80-foot interior falsework platform to pour concrete, or would it be cheaper to build an 8-, 10-, or 12-foot platform?

A. I never figured that, but I imagine it would be cheaper with some other type of construction. I don't know. [256]

Q. If you were only building a platform to pour five feet to ten feet at a time, you do not have to put in the heavy structural uprights, would you, that you do for a higher pour, when you are going to build a high falsework?

A. No, I do not imagine I would.

Q. You would not have to do the bracing there if you were only up there eight, ten, or twelve feet, that you would have if you were up sixty or a hundred feet, or fifty feet?

(Testimony of Lester Earl Stevens.)

A. Soule Steel did the bracing to support the steel.

Q. Showing you Defendants' Exhibit B, and calling your attention to the anchor bracing, was that put in by Soule Steel, or by Union Paving Company?

A. That was put in by Union Paving Company.

Q. What piers do you refer to as having been put in on the platform by——

A. Do you see (indicating)? These angle braces coming down here, one here, one here—you have those all through your piers running various ways, which were put in by the Soule Steel Company.

Q. If you were only using a platform 8, 10, or 12 feet high, would you have a necessity for these angle braces 2 by 6 to hold those?

A. The angle braces?

Q. 2 by 6 angle braces, as here.

A. They would have to be braced; wouldn't stand up there long.

Q. The same size and type of braces to hold a five- or ten-foot platform——

Mr. Moore: I think the question is argumentative, your Honor. I object to it.

Mr. Wrigley: (Continuing) ——that you would have for a 60-or 80-foot platform?

A. You have to continue the bracing as you go up. [257]

Q. The same size, irrespective of the height. That is all from this witness.

(Testimony of Lester Earl Stevens.)

Cross-Examination

Mr. Moore: Q. Mr. Stevens, you went on the job in January, 1940, I believe, and stayed practically continuously until February, 1941, is that correct? A. Yes, sir.

Q. When was the first request ever conveyed to you by a representative of the Soule Steel Company to put up any falsework?

A. Around the 25th of October, 1940.

Q. Up to that time had anybody, any representative of the Union Paving Company, ever made a demand or request that you put up the falsework in any of those piers for the interior?

A. On October 18th, Mr. Dowling said, "You can put up the falsework, yourself." That was the first—

Q. That was the first time?

A. That was the first time.

Q. Was there an accident there on the job; a man killed? A. Yes, sir.

Q. And that was on what date, do you remember? A. October 15th.

Q. And how was he killed, just in a very general way?

A. Well, the boom the man was on top of turned over, throwing the man down into the base of the pier, on the outside.

Q. Who was handling the boom at the time?

A. The Union Paving Company.

(Testimony of Lester Earl Stevens.)

Q. After that occurred, did you have any conversations with Mr. Morissette or Mr. Dowling?

A. I talked to Mr. Morissette just after the accident.

Q. What was said, if anything?

A. Well, there was a question about the accident. Nothing in particular—more describing it was too bad the accident happened.

Q. Subsequent to that time, did you have a conversation with Mr. [258] Dowling and Mr. Morissette?

A. On the 18th Mr. Dowling came up——

Q. What is that?

A. On the 18th of October Mr. Dowling was on the job, and we went up over the pier and discussed the conditions.

Q. What was said at that time?

A. Well, there was a discrepancy there on moving the derrick, why it was being moved, and the question came up about the falsework. Mr. Dowling said, "You can place your own falsework. You can go ahead and place the falsework." And he took the stand that I would not be allowed to move any of the timbers that he had placed in that falsework, that we were not going to move any of his forms or supports.

Q. What did you do after he notified you at that time?

A. I put the derrick back up where it was and set the steel.

(Testimony of Lester Earl Stevens.)

Q. Did you communicate with the home office of Soule at that time? A. Yes, sir.

Q. Subsequently to that did you have any further conversations with Mr. Dowling or Mr. Morissette in regard to this matter—I mean the falsework?

A. I imagine we had—yes, we did have conversations on it afterwards. The question came up very frequently.

Q. Up on the job? A. On the job.

Q. Do you remember any particular conversation that was had there?

A. No, nothing in particular.

Q. I will put it this way, then—perhaps it is slightly leading—were any complaints made that the Soule Steel Company was not proceeding with diligence?

A. We got a letter from Union Paving Company to proceed with the falsework, to proceed with the steel work on Pier 5. Just the date of that I don't remember.

Q. I hand you a letter, or a copy of a letter dated October 28th, [259] Defendants' Exhibit GG, and ask you if that is the communication that you have reference to. A. Yes.

Q. Did you have at one time any men working on that falsework, at all, the framework?

A. On October 25th we may have had some men on that falsework. I think there was one or two men who went up there on the same work on that day.

(Testimony of Lester Earl Stevens.)

Q. Where was Mr. Soule at the time?

A. Mr. Soule was in Washington, D. C.

Q. You were communicating with his office, here? A. Yes, sir.

Q. That was countermanded, was it? Any men that were put on that were stopped immediately, weren't they? A. Yes, sir.

Q. I call your attention to a letter—I do not know whether this witness has identified it—I will hand you a letter. I don't know whether you have seen it. I will ask you whether you saw that at or about the time, or a copy of it?

A. I do not recall the letter. That possibly did not come to the general office.

Mr. Moore: We will offer this, your Honor, by stipulation with counsel, a letter dated October 28, 1940, addressed by the Union Paving Company.

(The document was thereupon received in evidence and marked "Plaintiff's Exhibit 24," and was read by Mr. Moore.)

Mr. Moore: I believe the letters introduced yesterday by Mr. Wrigley follow this up, bringing it to a conclusion.

Q. You were asked about carpenters, carpenters working on some place. If the Union Paving Company carpenters were used, were they paid for by the Soule Steel Company, do you know?

A. Yes, sir.

Mr. Moore: I think that is all at this time, your Honor. [260]

(Testimony of Lester Earl Stevens.)

Redirect Examination

Mr. Wrigley: Q. Now, you say the carpenters were paid by Soule Steel Company. On whose payroll were they?

A. They were carried on Soule's payroll, and if they were not put on Soule's payroll there was an accurate check made with the foreman as to the amount of time they worked on the templates.

Q. Isn't it a fact that whenever the carpenters of the Union Paving Company did any work, that they were still carried on the Union Paving Company's payroll and Union Paving Company would bill the Soule Steel Company for that? A. No, sir.

Q. Coming down to Pier No. 4, which was, we will say, the last in point of time, was any template at any elevation ever set on Pier 4 by Soule Steel Company, to your knowledge? A. Yes.

Q. At what elevation?

A. At the lower elevations while I was there.

Q. Set by what men?

A. In some instances we used Union Paving carpenters, and our men were always working with them, lining them up.

Q. You set the lower portions when you were there? A. Yes.

Q. To what elevations do you refer?

A. We were one lift above the portion where the pier straightens up when I left.

Q. What date would that be, approximately?

(Testimony of Lester Earl Stevens.)

A. February 15th, approximately February 15th, 1941.

Q. We will go back, we will say, to January 10th. Would it be earlier than that, possibly?

A. I would say it would be in that neighborhood.

Q. Before or after that?

A. Possibly before.

Q. How much before?

A. Well, we started that pier late in the fall, 1940—September—along in there, sometime.

Q. Mr. Stevens, will you check your records during the noon hour [261] and produce them this afternoon, showing where you employed any men on Pier 4 at any elevation and paid them to set what we refer to as the templates? A. Yes, sir.

The Court: Is that all from this witness?

Mr. Wrigley: No, your Honor.

Q. Do you know Ted Balliet on that job?

A. Yes, I think that is his name, his last name. I knew him by Ted.

Q. He was the carpenter foreman?

A. Yes.

Q. You saw him quite continuously there, didn't you? A. Yes.

Q. Now, you said there was no request prior to October 18, 1941, with reference to the erection of any of this interior falsework. Wasn't that subject first brought up between you and Mr. Hunt—no agreement, discussion, or anything else—but the question as to who should install it, and you said

(Testimony of Lester Earl Stevens.)

that you would have to take it up with the San Francisco office? A. No, I do not recall that.

Q. Isn't it a fact that Mr. Dowling, in July, 1940, discussed with you the fact that under the contract, above the base, Soule Steel Company was to erect the interior falsework and/or pay for it?

A. No.

Q. And isn't it a fact that in September, 1940, Mr. Dowling again took that up with you and told you very definitely that he would not pay you any more money until some agreement was reached as to a proper division of the cost of that interior falsework? A. No.

Q. And isn't it a fact that just prior to that you took this whole matter up with Ted Balliet, the carpenter foreman, for the Union Paving Company, as to how the cost of that falsework should be divided, and he told you that in his opinion it should be divided 50/50? A. No. [262]

Q. Did you have any conversation with Mr. Ted Balliet at any time with reference to the division of the cost of that interior falsework? A. No.

Q. Did you ever have any discussion, at all, with Ted Balliet, with reference to the falsework?

A. Possibly talked about the falsework, yes.

Q. Approximately what dates did you discuss it with him? A. I wouldn't recall.

Q. Isn't it a fact that Ted Balliet was a carpenter foreman on that job during the entire time that you were there?

A. A good portion of that time. I don't remem-

(Testimony of Lester Earl Stevens.)

ber whether he was there when I first came on the job, or not. He may have been.

Q. Isn't it a fact that on numerous occasions, and on practically all of the piers, you and Ted Balliet discussed what interior reinforcing was necessary before you would go ahead and place the steel? A. No, sir, no.

Q. Didn't you also discuss with Ted Balliet the matter of the cross-bracing at the different elevations, that there should be more or less than there was there? A. No.

Q. You never discussed that subject with Ted at all?

A. Any additional bracing we placed ourselves.

Q. And you never, so far as you can recall, pointed out to him what was necessary and how he should do it? A. No.

Q. Was there any other carpenter foreman there besides Ted Balliet at any time that you were there?

A. A man by the name of Mr. Scott—or Mr. Black—Mr. Black was on Pier 4.

Q. What position did he occupy?

A. He was carpenter foreman.

Mr. Wrigley: That is all.

The Court: Step down. [263]

L. H. MORISETTE,

called as a witness on behalf of defendants; sworn.

The Clerk: Q. Will you state your name?

A. H. L. Morisette.

Direct Examination

Mr. Wrigley: Q. What is your business, Mr. Morisette? A. Construction worker.

Q. And you have been such for how long?

A. About ten years, Union Paving Company.

Q. Ten years with the Union Paving Company?

A. Yes.

Q. Prior to that——

A. I worked for the Southern Pacific Railroad.

Q. Coming specifically to the so-called Pit River pier job and abutments, when did you go to work on that job? A. I didn't hear the question.

Q. I said, coming specifically to the Pit River and abutment job, when did you go to work there?

A. The latter part of June, I think, or sometime possibly the middle of June, 1940.

Q. And you were there how long?

A. Until June, 1941.

Q. When you first went there in June of 1940, what did your duties consist of? What were you doing?

A. I went up there first to assist Mr. Cochrane, who was the superintendent there at that time.

Q. And later?

A. Later I was superintendent.

Q. Starting approximately when?

(Testimony of L. H. Morisette.)

A. Well, the latter part of July, I think.

Q. Of 1940? A. 1940.

Q. You, of course, knew Mr. Stevens on that job? A. Yes, sir.

Q. And what position did he occupy or appear to occupy?

A. Mr. Stevens was superintendent for the steel, the reinforcement steel. [264]

Q. That is the placing of the reinforcement steel?

A. The placing of the reinforcement steel.

Q. Was there any other representative of the Soule Steel Company regularly on the job over him?

A. Not that I know of, no.

Q. In other words, so far as you knew or understood, he was the head man there for Soule Steel Company? A. That is right.

Q. After you came on the job, did you have any discussions with Mr. Stevens with reference to the placing of reinforcing steel?

A. Well, I had numerous discussions with Mr. Stevens relative to the placing of reinforcing steel, because that was his work.

Q. Approximately when was the first discussion that you had with him?

A. Relative to placing reinforcement steel?

Q. Yes.

A. I couldn't tell you, probably as soon as I got there.

Q. Anything particular about that discussion that impressed itself upon your mind?

(Testimony of L. H. Morisette.)

A. No.

Q. Or just a general discussion?

A. Just general discussions about locations of placing steel, the possibilities of where we would be pouring next, or where we would want his services next.

Q. Did you ever have any discussions with Mr. Stevens with reference to delay in placing reinforcing steel?

A. Numerous discussions.

Q. Starting when?

A. I would say in July, August—right along in there.

Q. Give us the substance of what you said and what his reply was.

A. Well, I don't recall word for word, but my complaint was, as far as delay in placing reinforcement steel, that he was not doing it fast enough, or using crews, or working enough shifts to place it in time for us to keep a continuous operation going and coordinate our operations.

Q. And what reply would he make?

A. Generally he would state that [265] he was doing the best he could, which I think he was, possibly, with the crews at hand.

Q. You say with the crews in hand.

A. With the crews that he had.

Q. During that period—we will say July, August and September, 1940—what size crews did they have there erecting the reinforcing steel?

A. I think that generally he worked two shifts—

(Testimony of L. H. Morisette.)

I mean one shift, and that he had either two or three crews—I am not sure—and that the crews would vary; under a foreman they would probably vary from six to eight, although many times only two or three men would be working in one place.

Q. Did you have any discussion with Mr. Stevens with reference to the placing of the interior falsework or framework there?

A. I was present at discussions where that subject was brought up.

Q. Who else was present at the first discussion on that subject that you have in mind?

A. Mr. Dowling, Mr. Stevens.

Q. Where did that discussion take place?

A. Where?

Q. Yes. A. On the job.

Q. About what date?

A. I couldn't remember the dates.

Q. Approximately.

A. I would say in July, sometime, the latter part of July, possibly, or the middle of July.

Q. Of what year? A. 1940.

Q. Give us the substance of that conversation, what each said, as you remember it.

A. Well, my recollection is that the first discussion was about in July. It took place near the shop, which was located between Piers 2 and 3, and that Mr. Dowling told Mr. Stevens, "It is about time we should determine [266] some proportion of responsibility in reference to the interior scaffolding or bracing for the falsework."

(Testimony of L. H. Morisette.)

Q. That is what Mr. Dowling said. What reply did Mr. Stevens make, if any?

A. Mr. Stevens said he would have to take it up with San Francisco.

Q. When was the next conversation that you have in mind, approximately?

A. My next—the next one—my next recollection of that is early in September. I am not sure just exactly the time.

Q. Where did that conversation take place?

A. I think it took place in front of a little warehouse or tool shed that Mr. Stevens had there near our office on the job.

Q. And who was present?

A. Again Mr. Dowling and Mr. Stevens.

Q. Just what was said at that time, as you remember it?

A. Mr. Dowling pressed again for some decision or some method of distributing the cost of the falsework, the interior falsework.

Q. What reply was made, if any?

A. Well, as I recall, there was no definite—Mr. Stevens was evasive.

Mr. Moore: I ask that that go out.

The Court: It may go out. State what he said, as near as you remember.

A. I don't remember what Mr. Stevens said, except nothing definite.

Mr. Wrigley: Q. Were there any later conversations on that subject in your presence?

(Testimony of L. H. Morisette.)

A. Yes, sir.

Q. Approximately what date?

A. I would say in October, the latter part of October.

Q. Where did they take place?

A. I think they were on the job, on the north side of the river; I am not sure.

Q. Who was present, as you remember it?

A. Again Mr. Stevens and Mr. Dowling, and possibly Mr. Hunt, but I am not sure. [267]

Q. Give us the substance of what each person said at that time, as you remember it?

A. Well, my recollection is that Mr. Dowling again told—brought the matter up and told Mr. Stevens that he would not set any more reinforcement interior supports or falsework, and that Mr. Stevens said he would take it over.

Q. Anything else that you remember said at that time? A. Any other conversation?

Q. No, I say was there anything other than that said at that conversation?

A. I don't recall—I don't recall in any detail.

Q. Following that conversation, did Soule Steel Company undertake to set the falsework?

A. Yes, sir.

Q. How long did they continue it?

A. They set falsework the next day, and that was the only day.

Q. Did you have any later conversation with any representative of Soule Steel Company on the matter of setting the falsework?

(Testimony of L. H. Morisette.)

A. I think Mr. Stevens left that night—I am not sure—in any event, Norman Klein, who was his foreman, and I think at that time possibly the only foreman that he had there, said the next day that Mr. Stevens had telephoned him to stop setting bracing or falsework.

Q. Did you have any later discussion on that subject? A. I think in the spring of 1941.

Q. I didn't get that last answer.

A. In the spring of 1941.

Q. Where did that conference take place?

A. That was in reference to Pier 4, and I think it took place in the vicinity of Pier 4, some place.

Q. Who were present?

A. I think Mr. Klein, I'm not sure about Mr. Stevens, and I think Mr. Dowling also.

Q. What was said at that time?

A. We requested that they build [268] the interior falsework and bracing to support the steel.

Q. What reply was made?

A. I think they refused to.

Q. And with the exception of this one date in the latter part of October, they did not at any time set interior framework or falsework on which to recline the steel? A. No, sir.

Mr. Wrigley: That is all.

Cross-Examination

Mr. Moore: Q. This meeting that took place in October, that was shortly after that man was killed up there, was it not?

(Testimony of L. H. Morisette.)

A. Well, I think it was after that a few days.

Q. And Mr. Dowling was up there at the time?

A. Yes sir.

Q. Will you repeat just what Mr. Dowling said to Mr. Stevens at that time?

A. I can give you my recollection of that. I think that he told Mr. Stevens, "Hereafter we will not set any more falsework for the steel."

Q. Is that all he said?

A. Yes. Undoubtedly, there was other conversation; I do not recall what it was about, particularly.

Q. That is the only thing you recall?

A. That is the thing that stands out in my mind.

Q. Did Mr. Dowling say, "If you do not set it, we are going to sue you and throw you off the job"?

A. No.

Q. He did not say that? A. No.

Q. You are sure?

A. I don't recall it. I didn't hear it.

Q. What did Stevens say, that he would set it, or he wouldn't set it?

A. He said he would call San Francisco and find out.

Q. Did he say anything about Mr. Soule being in Washington, D. C.? A. No.

Q. He did not say anything about that?

A. No, not about being in Washington. I am aware of the fact that Mr. Soule was [269] in Washington. I don't know when or where.

(Testimony of L. H. Morisette.)

Q. You do not remember Stevens saying at that time, "Well, Mr. Soule, who is in charge of this, is in Washington, D. C. at present and can't be reached; the difficulty in reaching him except by telephone or telegraph"?

A. I do not recall that definitely, no.

Q. Would you say that he didn't say that?

A. I wouldn't say that he didn't.

Q. When was this first conversation that you listened to between Mr. Dowling and Mr. Stevens?

A. I didn't hear the question.

Q. When did you say the first conversation took place?

A. I would say it was in July, possibly the middle of July.

Q. Possibly the middle of July?

A. Maybe before, but in July sometime.

Q. Were you superintendent at that time?

A. Well, you might say I was acting superintendent.

Q. Wasn't Mr. Cochrane on the job?

A. I don't think he was there at the moment. Mr. Cochrane was sick.

Q. And you were with Mr. Dowling.

A. Yes.

Q. And did he hunt up Mr. Stevens?

A. I don't remember whether he hunted him or whether we ran into him, or whether he ran into us. I know that we met and we were in a group.

(Testimony of L. H. Morisette.)

Q. Just what did Mr. Dowling say to Mr. Stevens on that occasion?

A. My recollection is that he told him it was about time that we should devise or determine some method of proportioning the cost of the interior falsework.

Q. Proportioning the cost of the interior falsework, is that it?

A. Yes, handling it in some way.

Q. He did not say anything to the effect, "It is your duty under the contract to put it in," did he?

A. The impression I [270] got was——

Q. I am asking you what he said. Did he say anything of that kind?

A. I don't recall the exact conversation.

Q. But he talked about apportioning the cost at that time, did he? A. Yes, sir.

Q. Did he suggest how it should be apportioned?

A. No. He said it was about time that they arrived at some method of apportioning it.

Q. And Stevens said he would take it up with the San Francisco office? A. Yes.

Q. Didn't he ask Mr. Dowling why he didn't take it up with Mr. Soule?

A. I don't recall that he did.

Q. Didn't he say, "I am only the superintendent on the job. Why don't you take it up with him?" A. I don't think he did.

Q. Did Mr. Dowling say he had taken it up with Mr. Soule and couldn't get any satisfaction out of him? A. No.

(Testimony of L. H. Morissette.)

Q. Never suggested that he had ever discussed the matter with Mr. Soule? A. No.

Q. But he talked to those men and said, "Now, you and I want to talk about how to divide and apportion this cost." Is that what he said in effect?

A. He said it was about time that we should arrive at some thod of apportioning the cost.

Q. Didn't Stevens ask him why he took it up with him rather than taking it up with Mr. Soule?

A. No.

Q. And you say that Stevens said he would take it up with the San Francisco office?

A. Yes, sir.

Q. Then the same thing occurred two months later, is that correct?

A. Approximately two months.

Q. Did Mr. Dowling say at that time,—will you repeat again what he said at that time, that Mr. Dowling said to Stevens? [271]

A. The first time?

Q. No, the second time, in September.

A. I don't recall the exact words. I think I said a little while ago I did not, but I think the subject was the same subject that was brought up with the same result, that we go no place on it.

Q. That they wanted to get an arrangement to apportion the cost, is that right?

A. An arrangement to take care of the false-work, who should do it, how to pay for it, and so forth.

(Testimony of L. H. Morisette.)

Q. What did Stevens say, he had taken it up with San Francisco, or was?

A. I do not recall.

Q. You do not remember what Mr. Stevens said?
A. No.

Q. Do you remember Dowling saying to Stevens, "It has been two months now and you haven't taken it up with your San Francisco office"?

A. N.

Q. Did Mr. Dowling say to Mr. Stevens, "Well, I have taken this up with the San Francisco office"?

A. No.

Q. At this September meeting did Mr. Dowling threaten Stevens that if he did not take care of the falsework, or apportion it, or agree to some apportionment with him, that he was not going to pay him any more money?

A. I do not think he said anything about that. I am not sure.

Q. But in October, why—that was after a man had been hurt—there was a very definite conversation?
A. Yes.

Q. Did he ask him then why he had not taken it up with the San Francisco office?

A. I do not recall that he did.

Q. Did Mr. Dowling suggest to Mr. Stevens in any way that he had tried to take this matter up with the San Francisco office, or Mr. Soule and had met with no success?

A. I do not recall that.

(Testimony of L. H. Morissette.)

Q. All he did at this October meeting, he told Mr. Stevens— [272] Will you say again just what Mr. Dowling told him?

A. My recollection is that he told Mr. Stevens that we would set no further false work for the reinforcement steel.

Q. You were the superintendent. Did he give you instructions to stop work then?

A. Yes, sir.

Q. And you refused to set any more or do any more work? A. Yes, sir.

Q. At that time? A. At that time.

Q. Were you conferred with with regard to this letter that Mr. Hunt wrote to Stevens to the effect that they were not proceeding with their work? Were you consulted in regard to that?

A. I think I saw the letter. I am not sure. I would have to see the letter to know.

Q. Calling your attention to a letter signed by Mr. Hunt, have you seen that before?

A. Yes, sir, I recall that letter.

Q. Were you there when it was signed?

A. I think so.

Q. As a matter of fact, didn't Mr. Dowling dictate that and Mr. Hunt seen it?

A. I couldn't tell you.

Q. Don't you remember?

A. I don't know. I think Mr. Hunt wrote it, though.

Q. You do not know under what instructions

(Testimony of L. H. Morisette.)

he wrote it, do you? You did not give them to him, did you? You were superintendent on the job.

A. I told him we were stopped there without the reinforcement steel.

Q. When you went up there and replaced Mr. Cochrane, didn't you have discussions with Mr. Dowling and complaint about lack of diligence of the Soule Steel Company?

A. No, sir, definitely not.

Q. But you were complaining about the lack of diligence, isn't that true?

A. Not at the start. [273]

Q. When did you start to?

A. I would say sometime early in July.

Q. You also complained about the lack of diligence of the Welding Company, did you not?

A. That is right.

Q. They quit the job, did they not?

A. They did.

Q. And you complained about their lack of diligence, did you not, in welding? A. To whom?

Q. To them. Didn't you write them letters, or didn't you complain to their foreman that they were not proceeding with the welding?

A. At times, possibly.

Q. As a matter of fact, they had a man who was doing the excavating. Did you complain to him, too? Were you there when he was on the job? A. Who is that?

Q. The one who started the excavation there, because his money was withheld; were you there

(Testimony of L. H. Morisette.)

when his money was withheld and he had to quit the job? A. No.

Q. But you did give notice to this Welding Company that they were not diligent in prosecuting their work, didn't you?

A. I do not recall any notice.

Q. I mean to their foreman.

A. I think I complained that they were not diligent. I don't know whether it was their fault, or not. They had labor difficulties.

Q. And you were complaining about Soule's lack of diligence?

A. I did complain about Soule's lack of diligence, not competence.

Mr. Moore That is all of this witness.

Mr. Wrigley: If the Court will just bear with me a minute on this witness.

The Court: Very well.

Redirect Examination

Mr. Wrigley: Q. Isn't it a fact that when you went there in [274] June of 1940 everything on the job was way behind schedule so far as the Government was concerned?

A. That is a fact.

Q. And you were trying to catch up?

A. That is right.

Q. And you were complaining continuously about everybody being slow, isn't that the fact?

A. The job was running twenty-four hours a day, and we were trying to utilize every means to speed up and catch up, particularly with the ex-

(Testimony of L. H. Morisette.)

cavation, the carpenter work, and to have some place to pour concrete, and after we started to pour concrete, to pour it continuously.

Q. And almost continuously from the time you went there until you got through you were behind Government schedule, weren't you?

A. That is right.

Q. On each and every pier and abutment, with few exception?

A. On all schedules, I think, except one.

Mr. Wrigley: That is all.

Mr. Moore: No questions.

The Court: We will take an adjournment until 2:00 o'clock.

(A recess was here taken until 2:00 o'clock p. m.) [275]

Afternoon Session — April 16, 1943 —
2:00 o'Clock P. M.

LESTER EARL STEVENS,

recalled.

Redirect Examination (resumed)

Mr. Wrigley: Q. Mr. Stevens, during the noon hour you were to look at the plans and tell us, first, how many steel bars there were in two concentric circles around that Pier 4 half way to the top. A. Half way to the top?

Q. Yes.

A. You will have to excuse me on that. I didn't look that up.

(Testimony of Lester Earl Stevens)

Q. Can't you just look at one of these drawings of Pier 4? A. Yes, we can.

The Court: Do you know, Counsel, what it is, yourself?

Mr. Wrigley: No, your Honor, only hearsay from their man, Mr. Klein, and I wouldn't even attempt to figure it.

Mr. Moore: There doesn't seem to be any map or Government plan, or any diagram of the reinforcing steel on Pier 4.

Q. Is that correct?

A. That is correct. There was more steel in Pier 4 than there was in 3.

Mr. Wrigley: Q. Pier 4 was, from the standpoint of steel and from the standpoint of concrete, the big pier, wasn't it? A. Yes.

Q. And is even considerably larger in size and deeper in the ground than Pier 3, which is on the south side of the river?

A. Well, no, there wasn't much difference. I think there was only 6 to 12 inches difference in the height of the two piers.

Q. Didn't Pier 4 have a larger base than Pier 3?

A. It may have been five feet wider one way.

Q. And it also went slightly deeper in the ground, didn't it?

A. Yes, one corner we had to carry down in the pier. [276]

Q. Considerably lower than 3? A. Yes.

Q. In fact, Pier 4 and Pier 2 were not constructed in accordance with the original design

(Testimony of Lester Earl Stevens)

in that particular; they were excavated deeper in order to get footing, weren't they?

A. I don't remember on Pier 2 whether it was, or not.

The Court: Whether it did or not does not enter into the merits of this case.

Mr. Wrigley: Only into the question of the variation of the amount of steel.

Q. Now, with reference to the false work, including the templates and the spacers on all the piers, 1 to 7, inclusive, wasn't all that lumber bought and paid for by Union Paving Company?

A. Yes, sir.

Q. Did Soule Steel Company ever reimburse Union Paving Company for any of that lumber?

A. Not to my knowledge. I don't think we ever received any bill for it.

Q. And you never paid for any of it, either, did you, to your knowledge? A. No.

Q. Now, you left there, as I remember, according to your testimony, April of 1941, is that correct?

A. February.

Q. Pardon me. I think I made a misstatement. You are correct. You said February 18, 1941. My statement of April was not correct. At that time Pier 4 was started and what we might call the base was then complete, was it not? A. Yes.

Q. They were just about starting up on the next portions of it at the time you left?

A. They had part of that concrete poured. There

(Testimony of Lester Earl Stevens)
was one lift of steel already placed above the pyramid section.

Q. Did you examine your records and find where you paid for any carpenter labor for erecting spacers or templates above the [277] base of Pier 4?

A. Above the base?

Q. Yes.

A. I have some time here. It is a copy of the time kept by Union Paving's foreman, which was turned over to the man who picked up the job after he left, Mr. Klein, in which he states here "Paid by Union Paving Company, accepted as chargeable to the Soule Steel Company."

Q. But was it paid by——

A. It was paid by the Union Paving Company.

Q. Was it ever repaid, to your knowledge, by the Soule Steel Company to Union Paving Company?

A. We have been billed for those billings. We have been billed for this labor.

Q. Have you ever received any billing for it outside of the general billing for labor for falsework, and so on?

A. I do not know as to this particular part of it, but we have billings on labor for placing templates.

Q. Was any of that ever paid, or just you received the billing for it throughout the entire job? I refer now to the carpenter labor employed by the Union Paving Company.

(Testimony of Lester Earl Stevens)

A. I O.K.'d these to allow for payment.

Q. But was it ever paid, to your knowledge?

A. I take it for granted that it was deducted from the billing. Now, I can't say as to that—deducted from the payment.

Q. Did you find any record where the Soule Steel Company on Pier 4 above the base ever paid any of these men direct for carpenter work, setting templates, or spacers?

A. I have to go into the Government reports in order to check that. The records I have now don't show it. It would take some time to locate them.

Q. Have you any personal recollection?

A. As it was, as I wasn't on the job after we left the base of the pier, I couldn't [278] say as to that.

Mr. Wrigley: That is all.

Mr. Moore: That is all.

Mr. Wrigley: Now, there are two phases of this case that I am just a little uncertain on the order of procedure at this time, both as to Mr. Soule and Mr. Stevens. We called them under Section 43. After that examination they were examined by their counsel, and we desire to put Mr. Dowling on to rebut certain of their testimony in rebuttal, and it would seem to me out of order at this time to present that rebuttal until they have completed their case.

Mr. Moore: We will proceed.

Mr. Wrigley: The other matter I am practically lost on. The carpenter foreman assured us he would be able to be here today, and he was to have been at my office at one o'clock, to take the stand at two this afternoon. That was the program. This morning he advised that he is engaged in the war work across the bay, and they will not release him, and he cannot appear here as a witness. Now, there are two procedures: One, we might say we could forget his testimony, or we could take it by deposition, or it may be that they will stipulate to the substance of what he would testify to.

The Court: There is nothing before the court at this time. Call your next witness.

LESTER EARL STEVENS,

recalled as a witness for plaintiff in rebuttal, having been previously sworn, testified as follows:

Mr. Moore: Q. Mr. Stevens, in connection with this Pit [279] River job, when did you first come to San Francisco?

A. I came to Mr. Soule's office on November 3, 1939.

Q. Your home is in Seattle, is it? A. Yes.

Q. How long did you remain here?

A. I was here until the 14th or 16th, in there somewheres.

(Testimony of Lester Earl Stevens)

Q. During that period of time did you make various estimates with relation to the cost of placing the reinforcement steel, working in collaboration with Mr. Soule? A. Yes.

Mr. Wrigley: I want to object to this as incompetent, irrelevant, and immaterial, attempting to vary the terms of a written contract.

The Court: The objection is overruled.

A. Yes, we did.

Mr. Moore: Q. Did those estimates include supporting devices? A. They did at first.

Q. Or supporting members? A. Yes?

Q. When you left here where did you go?

A. I went over the job with Earl Holcomb, went over the job at Redding on the Pit River.

Q. Then where did you go?

A. I continued on to Seattle.

Q. Did you subsequently return to San Francisco?

A. I returned to Seattle on December 8th.

Q. To Seattle, or San Francisco?

A. To San Francisco. Pardon me.

Q. Did you at that time revise the former estimates that had been made, or assist in the collaboration of that? A. Yes, we did.

Q. And did those new estimates include or not include the re-inforcing members?

A. They did not.

Mr. Wrigley: Same objection to this entire line of examination. [280]

The Court: Read the question, Mr. Reporter.

(Testimony of Lester Earl Stevens)

(Question and answer read.)

The Court: The objection is overruled.

Mr. Wrigley: Will you stipulate, Counsel——

Mr. Moore: I will stipulate.

Mr. Wrigley (continuing): —that my objection runs to this entire line of examination, and I will in due course make a motion to strike out?

Mr. Moore: So stipulated.

Q. Mr. Stevens, did you return to San Francisco again? A. Yes.

Q. What date was that?

A. I came down by plane on December 28th.

Q. Arriving here when?

A. December 28th. I went to Mr. Soule's office on the 29th of December, 1940 — 1939.

Q. Whom did you meet there?

A. Mr. Cochran, and Mr. Dowling, and Mr. Soule.

Q. Was a conference had there at that time between the four of you? A. Yes.

Q. Where did that conference start? In what part of the building?

A. Well, we went to Mr. Soule's office first, and then we went upstairs into the engineering room.

Q. Who went upstairs?

A. Mr. Soule, and Mr. Dowling, and Mr. Cochran and myself.

Q. Had you ever met Mr. Dowling before, or was that your first meeting?

A. I don't remember if I met Mr. Dowling before, or not. I couldn't say as to that.

(Testimony of Lester Earl Stevens)

Q. You have no particular recollection of meeting him before? A. No.

Q. When you arrived up in the engineering room, what occurred up there?

A. We had gone over plans, and was discussing [281] the reinforcing. The principal thing was the supports for reinforcement steel—the timber structure that was going to be used.

Q. What occurred then? What was done?

A. It was described by Mr. Dowling and Mr. Cochrane—principally Mr. Cochrane—the type of falsework that he was going to use, and which could be used by the Soule Steel Company free of charge for supporting their reinforcement steel.

Q. What was done there, anything at all—any more accurate description of the type of structure?

A. Well, we had this drawing that has been presented, and there was sketches drawn in just how the falsework would be erected.

Q. By this drawing, you refer to Plaintiff's Exhibit 22, is that correct? Will you look at it?

A. Yes, sir, this is the same drawing.

Q. And that was present in the drawing room when yourself, Mr. Dowling, Mr. Cochrane and Mr. Soule were present, is that correct?

A. Yes, sir.

Q. What was the condition of this drawing at the beginning of the conference?

A. May I have that question again?

(Question read.)

(Testimony of Lester Earl Stevens)

A. Well, it showed the reinforcing steel on the outside, which was put on in Los Angeles.

Q. What else did it show?

A. It may have showed some of the pours, the elevation of the pours at that time.

Q Did Mr. Cochrane and Mr. Dowling describe at that time the type of falsework or framework that they intended to use? A. Yes, they did.

Q. Will you tell us, as nearly as you can, what they said?

A. Well, they said they were going to place a timber structure [282] of 10 by 10 timbers, and that would be continued all the way up the piers. Now, this timber may not be to the proper size for the reinforcing steel, but it was to be of our account, Soule Steel Company, to build out any horizontal timbers or supports and place a template around it which the reinforcing steel could be laid against.

Q. Now, as this type of structure was described, what, if anything, did Mr. Soule or yourself do?

A, May I have that question again, please?

(Question read.)

A. We placed the templates in some instances; in some cases they were placed with the Union Paving contractor's—

Q. No, I do not mean that. I mean at this conference—I am not talking about the templates now—I mean at this conference, with this drawing before you, what, if anything, did you or Mr. Soule do as it was described to yourself and himself, as

(Testimony of Lester Earl Stevens)

to the type of structure they were going to put in there?

A. Well, it looked entirely satisfactory.

Q. What did Mr. Soule do while Mr. Cochrane described it to him?

A. Well, Mr. Soule drew in the falsework, the type that they informed him they were going to use.

Q. Did you see him draw it in?

A. Yes, I did.

Q. That was in the engineering room with this map before you?

A. In the engineering room of Mr. Soule, yes.

Q. It was described at that time by Mr. Dowling and Mr. Cochrane? A. Yes.

Q. And he drew it into the picture, did he?

A. Yes, sir.

Q. What happened after that portion of the conference, Mr. Stevens?

A. Well, we went downstairs, and Mr. Dowling and Mr. Cochrane—they left the office and went out for—no, we went [283] to dinner and came back, but after the discussion on the drawings we went down to the office, Mr. Soule and I, and Mr. Dowling and Mr. Cochrane went for a walk, and we went down and rechecked our figure.

Q. And then what happened?

A. We arrived at a lower figure, and they came back, and we finally started debating on the final price.

Q. What was said, and who said it, if you recollect?

A. Well, Mr. Dowling asked if we had our price

(Testimony of Lester Earl Stevens)

arranged, and Mr. Soule gave him a price, and it didn't seem to agree with the total——

Q. What was the price?

A. \$24 a ton, the price Mr. Soule gave to Mr. Dowling,

Q. And then what happened? Go on with the conversation, if you will. What occurred?

A. Mr. Dowling had a lower price in there of \$21 or \$22 a ton that he expected to place the steel for. We discussed the thing back and forth, and finally agreed—we came within a few dollars, or a few cents, you might say, a ton, and Mr. Cochrane and I—we were in the room present at the time—and we suggested that we split the figure, which brought it to \$22.50 a ton.

Q. I will hand you two documents here, Plaintiff's Exhibit 21 and Plaintiff's Exhibit 23, and the two letters that have inter-lineations in them, typewritten; have you seen those before?

A. Yes.

Q. Where did you see those?

A. Well, Mr. Soule had two copies in his office that day, the 29th of December, and there were some changes that we wanted in here that wasn't on the original typewritten section of it, and Mr. Soule wrote in with pencil the additional changes which we agreed on as the contract. [284]

Q. Were those changes in the typewritten portion discussed there at the time by anybody when Mr. Soule wrote them in? A. Yes.

Q. Who entered into that discussion?

(Testimony of Lester Earl Stevens)

A. I would say the four of us—Mr. Soule, Mr. Dowling, Mr. Cochrane, and myself. We all understood it very thoroughly.

Q. Can you recollect in regard to the seventh item, in which was written in pencil that you were to furnish wooden supporting framework—do you recollect what was said, if anything, as that change was made?

A. Well, that was the main discussion that day, that the falsework would be furnished, and the type of falsework that was going to be furnished by the Union Paving Company.

Q. As you say, that was blocked out upstairs prior to the meeting down there? A. Yes, sir.

Q. Do you know what happened to those two letters or papers at the conclusion of the meeting?

A. Well, I know Mr. Soule kept one, and I think one was given to Mr. Dowling.

Q. What is your recollection?

A. Mr. Dowling took one with him, and Mr. Soule kept one in his office.

Q. Was any conversation had at that time about preparing a contract?

A. Mr. Soule said he would write up the contract, have one of the office employees write up the contract. Mr. Dowling said no, he would take it home and have it made up in his office.

Q. And he left with one of those papers in his possession, did he? A. Yes.

Q. For the purpose of illustration, did you, in conjunction with Mr. Soule, prepare a diagram as

(Testimony of Lester Earl Stevens)

to the completeness of the various piers and abutments as of October 15th? A. Yes. [285]

Q. And on this there is placed a statement of account up to that date. From what did you prepare this, or cause this to be prepared? What records?

A. That was the portion that was complete at the time of the accident, and the man was killed on the boom.

Q. For instance, abutment No. 1 shows it was completed May 4, 1940. There was 112 tons of steel placed in it. From what source did you get those records?

A. The tonnage is the Government report, and the completion date was the last work we did on the steel.

Q. And you followed that same process for the balance of the piers and abutments? A. Yes.

Mr. Moore: I will offer this as an exhibit as an illustration to show the condition of the work at that time.

The Court: It may be admitted and marked.

(The document was thereupon admitted in evidence and marked Plaintiff's Exhibit 25.)

Mr. Moore: I think that is all.

Cross-Examination

Mr. Wrigley: Q. Mr. Stevens, can you tell us the date that you say this particular drawing came back from Los Angeles?

A. No, I could not. I was probably not in the office when it came in.

(Testimony of Lester Earl Stevens)

Q. Prior to the 29th day of December, there was a previous drawing, wasn't there, a rough sketch? A. Not that I saw.

Q. Not that you saw? A. No.

Q. How do you fix December 29th as the date that you say that you, Mr. Soule, representing your company, and Mr. Cochrane, and Mr. Dowling were down there and discussing the price and other phases of the work?

A. Our record show that I came to [286] Soule's office on the morning of the 29th. I came down by airplane, and it was my wishes to return for New Years. I was unable to get out on the plane, so I took the train and got back and arrived in Seattle in time for New Years.

Q. Now, didn't this conference that you referred to take place when you were here on the 17th day of December, 1939? A. No.

Q. Of November, I mean to say? A. No.

Q. Have you any record you made, yourself, showing the date of that conference?

A. This wasn't—it was on the 29th. That was the only time that we had that complete understanding.

Q. All right. We will go back to the 17th day of November, 1939. Didn't you and Mr. Soule and Mr. Dowling have a conference—and Mr. Cochrane—at Mr. Soule's plant on Army street on the 17th day of November?

A. No. On the 17th day of November I was in Dunsmuir, California, to the best of my knowledge.

(Testimony of Lester Earl Stevens)

Q. Wasn't that the date, also, that Mr. Dowling was discussing the matter of the price?

A. No.

Q. How many times have you seen that drafting room at Soule's office?

A. How many times have I saw the drafting room?

Q. Yes.

A. I have been in there many times.

Q. You have been in there many times, haven't you?

A. Yes.

Q. What size are those drafting tables?

A. The table we were using is, oh, possibly four by nine or ten feet.

Q. And the drawing that you had in front of you that day was put down on that drafting table, wasn't it?

A. Yes.

Q. And was the drawing as wide as this? Was that drafting table as wide as this drawing?

A. Yes.

Q. That drafting table was as wide as this drawing?

A. Yes, sir.

Q. What date do you fix as the discussion of the price of \$22.50?

A. December 29, 1939. [287]

Q. And these two writings were there at that time, December 29th?

A. Yes, they were.

Q. And the changes that are interlined here were made at that time?

A. Yes.

Q. And at that same time the price was discussed and agreed on, you say?

A. Yes.

Q. Showing you Plaintiffs Exhibit No. 21, I

(Testimony of Lester Earl Stevens)

ask you if you see anything in there about a \$22.50 price.

A. I don't see it on this one, but I know that was the price that we agreed on.

Q. This writing says \$24.80, doesn't it?

A. The typewriting does.

Q. Yes, and there is no change of that in any particular, is there?

A. The price that was agreed on that day——

Q. No, I am talking about this writing.

Mr. Moore: The writing speaks for itself, Mr. Wrigley.

Mr. Wrigley: Q. Now, was the matter of a job engineer discussed that day? A. Yes, it was.

Q. Did you see the written contract of January 6, 1940, before it was signed? A. No.

Q. As I understand your testimony, after these changes were made, Mr. Dowling left there with one of these copies? A. Yes, sir.

Q. Now, prior to this drawing did Soule Steel Company have any drawing showing the construction of supporting devices there?

A. We had made various sketches of different ways of supporting the steel.

Q. As a matter of fact, you had sketches other than this one there which provided for Soule Steel Company supporting that reinforcing steel?

A. Yes.

Q. And those were used in that discussion, weren't they?

A. The different types were discussed, I know.

(Testimony of Lester Earl Stevens)

There is one type of drawing drawn on that same drawing. [288]

Mr. Moore: What was that?

(Record read.)

Mr. Wrigley: Q. I will ask you to examine this particular drawing and show me the markings or writings on it with reference to holding up the reinforcing steel.

A. (Indicating): These are carried out to support the steel against.

Q. What elevation are you pointing to now?

The Court: Are you gentlemen having a good time there? I am expected to follow this.

The Witness: These timbers were drawn in (indicating).

Mr. Wrigley: Q. Those are cross timbers?

A. Yes. Here are the vertical timbers carrying it through here.

Q. Now, these are the ones that you say were put on where?

A. In Mr. Soule's office, in the engineering room.

Q. By whom? A. Mr. Soule.

Q. This first sketch that we have here, consisting of eight cross sections, represents what height?

A. To the top, here?

Q. Yes.

A. This is approximately 90 feet above the base of the pier, as I remember it.

Q. Now, following that up to where those lines appear to stop—— A. Yes.

Q. ——can you tell us what elevation that is?

(Testimony of Lester Earl Stevens)

A. This would be approximately 150 feet.

Q. And extending from the extreme side of the markings that you say is an upright to the steel bars is what distance at that point?

A. I don't know if I get your meaning, exactly.

Q. The distance from the steel bars over to what is presumably the upright.

A. Your timber would carry up to your form. You notice we didn't check all this in. We didn't take the time [289] that day. Apparently this is the last one. You will notice these timbers are carried right out. Mr. Soule didn't take the time to carry the drawing all the way to the top.

Q. My question is, what distance does that show from this upright out to the reinforcing steel?

A. I couldn't tell you. At this elevation here I would say the outside timber, if it was drawn in the same as the rest of them, would be possibly four to five feet.

Q. An the outside upright timber, do you mean?

A. Yes, vertical timber.

Q. Did you notice that that was drawn marked a half inch to a foot?

A. No, I didn't notice.

Q. And isn't that better than three inches from that upright out to that reinforcing steel?

A. Well, I am referring to an upright that is continued up here. Mr. Cochrane, if I might say, distinctly went over this pier with his hand that way (indicating) and he said, "We are going to continue that right to the top."

(Testimony of Lester Earl Stevens)

Q. How long is this drawing?

A. I haven't measured it. I would say between eight and ten feet.

Q. How wide? A. Four feet.

Q. Would you hold one end of that? I want to unroll it. (Exhibit unrolled.) How long is that?

A. It looks like eight to ten feet to me. I would say approximately ten feet.

Q. And the drafting table, you think, was as big as that?

A. It would have been every inch as long, very close to it.

Mr. Wrigley: That is all. [290]

ALEXANDER COCHRANE,

called as witness on behalf of plaintiff in rebuttal;
sworn.

Direct Examination

Mr. Moore: Q. Mr. Cochrane, in 1939 and 1940 were you employed by the Union Paving Company?

A. Yes, sir.

Q. In what capacity in the fall of 1939?

A. As field superintendent of their bridge work.

Q. Were you present at a conference at which Mr. Soule, Mr. Stevens and Mr. Dowling were present sometime in December of 1939?

A. Yes, sir.

Mr. Wrigley: I object to this as incompetent, irrelevant, and immaterial, and an attempt to vary

(Testimony of Alexander Cochrane.)

the terms of a written contract in violation of Section 1625 of the Civil Code.

The Court: The objection is overruled.

Mr. Moore: Q. Can you fix the date of that conference? A. I think I can.

Q. What date was it?

A. I would say December 29, 1939.

Mr. Moore: I might say, your Honor, we had a transcript made—I haven't the certified public accountant here because I didn't expect that there would be any question—but I have asked our opponents to produce the log from the back of their daily sheets, and that log shows Mr. Dowling telephoned to Mr. Cochrane on December 28th, and Mr. Cochrane was in San Francisco on December 29th. If there is any question about it, we will bring the certified public accountant out to show he made those copies.

Mr. Wrigley: If you had asked earlier, I could have produced the log. I couldn't say whether it is correct, or not. Mr. Hunt says that is right, the log shows that.

Mr. Moore: Q. Mr. Cochrane, how did you go to the Soule [291] plant that day?

A. Mr. Dowling picked me up at 9th and Market somewhere around between 7:00 and 7:30, and we drove out to Mr. Soule's plant.

Q. What time did you arrive there?

A. Around fifteen minutes to eight, I think it was.

(Testimony of Alexander Cochrane.)

Mr. Wrigley: Can we stipulate, Counsel, that my objection goes to this entire line of examination?

Mr. Moore: It will be so stipulated.

Q. Was Mr. Soule there when you arrived?

A. I don't think so, but they came shortly just a few minutes after us. I know we all arrived about the same time.

Q. Then what happened? Can you tell us?

A. Well, we went into Mr. Soule's private room for a few minutes, and then we proceeded upstairs to this detail which has been exhibited here and commenced to talk about how we would lay out the falsework, which was practically left up to me as superintendent of the job. I immediately started to go into detail with Mr. Soule. I tried to show the method that we would use in putting up this falsework to pour our concrete, and I thought it might be helpful to them, and naturally would reduce their price by using this falsework, which was something we had to have, ourselves, to pour our concrete.

Q. Did you tell them that at that time?

A. Yes, sir.

Q. Was Mr. Dowling present?

A. Mr. Dowling was present.

Q. Did you outline to Mr. Soule the type of structure that you intended to put up?

A. Yes, I talked to Mr. Soule and he took the T-square and laid it out just as it is shown on that design, there.

Q. You have seen this design before, have you?

A. Yes, sir.

(Testimony of Alexander Cochrane.)

Q. I will call your attention to Plaintiff's Exhibit 22. Is [292] that the design that you refer to?

A. That is it. I know that is it without opening it out. I have seen it much lately. I don't know that there is any use wasting much time.

Q. What did Mr. Soule do, lay out the description of this on this as you described it to him?

A. That is what he done.

Q. Did you watch him lay it out?

A. Yes, sir.

Q. Did you check it as he laid it out?

A. We had a conversation going around all the time about the different methods that would be used, and he would put it down. Sometimes he would erase it and change it a little bit, until they got the idea what we wanted and what they would have to do, and if it was of any use to them, it would govern their price accordingly.

Q. And that as said there at that meeting?

A. Yes.

Q. How long did that meeting take place in the drafting room?

A. We were four hours in the morning and practically one hour after lunch.

Q. When you got through in the morning what did you do?

A. We went down to Manning's, on Brannan street, and had lunch, and then went back again and put in another hour upstairs in the drafting room.

Q. Who went to lunch that day?

(Testimony of Alexander Cochrane.)

A. Mr. Dowling, myself, Mr. Soule and Mr. Stevens.

Q. You went to lunch at Mannings and came back after lunch, and you went up to the drafting room again? A. Yes, about one hour.

Q. Who was there with you then?

A. Mr. Dowling, Mr. Stevens, Mr. Soule and myself.

Q. Were further details given of the plan at that time?

A. Just talking over a little bit what we discussed in the morning, to see if there was anything more that we could convince [293] them that would be any good to them, the falsework.

Q. What happened after you spent another hour up there?

A. Mr. Dowling suggested that they could give Mr. Stevens and Mr. Soule a little time to work this, figure it, and see what a proper figure would be, and in the meantime, as described here, he and I took a walk, about an hour, up to the housing project, and we came back in about an hour and went up to Mr. Soule's office.

Q. Then where did you go?

A. To Mr. Soule's private room.

Q. Will you state what occurred there?

A. I would say something like what Mr. Stevens said. In my own words?

Q. I wish you would.

A. All right. Mr. Dowling asked Mr. Soule if

(Testimony of Alexander Cochrane.)

they had arrived at a price, which Mr. Soule said he had, around \$24, I think it was. And I think Mr. Dowling, if I remember right, offered around \$21, and they brought it backward and forward a little bit until the figure was finally arrived at at \$22.50, Mr. Dowling was offering, and \$22.75 Mr. Soule was asking, and, as Mr. Stevens said, we got our heads together—there was such a small difference—we suggested to split the difference, which either he or I suggested to them, and they did, and agreed upon \$22.50, would be the basic price.

Q. I will draw your attention to two documents here that have been introduced in evidence. Plaintiff's Exhibit 21 and Plaintiff's Exhibit 23, and ask you to examine those, Mr. Cochrane. Have you ever seen those before?

A. Yes, sir.

Q. Where did you see them?

A. On December 29th, in Mr. Soule's office.

Q. There are certain interlineations on those in pencil. Were those on those at the time?

A. No, not when we arrived at the [294] price of \$22.50. After we had arrived at that price, then all those items were went over and those pencil writings were put in afterwards to form the contract.

Q. By Mr. Soule? A. By Mr. Soule.

Q. As you discussed them and agreed, he wrote in the pencil memorandum?

A. That is correct.

Q. Do you remember any discussion being had with regard to the pencil memorandum here, "You are to furnish wood support of framework"?

(Testimony of Alexander Cochrane.)

A. Yes, that would come out in the line, in the session that we had upstairs, because at that time that was shown what we intended to use, and this item 7 was changed, cutting out the steel supports and substituting the wood.

Q. Do you know what happened to those at the end of the meeting?

A. Mr. Dowling got a copy, I know, and went away with it to make up the contract.

Q. Do you know what happened to the other one?

A. I presume Mr. Soule kept that one.

Q. Was there any conversation about drafting the contract, there, who would prepare the contract?

A. Well, I think that——

Mr. Wrigley: It is leading and suggestive, but let it go.

A. I think that Mr. Soule and Mr. Dowling, after the price was agreed at—that I would answer I was a little bit out of the picture—and Mr. Soule and Mr. Dowling agreed then to put up—what they wanted to do about it.

Q. You do not know what they did in that regard?

A. No, after that I was practically out of the picture, as far as the drafting of the contract was concerned.

Q. Now, you were superintendent on the job up there, were you? A. Yes, sir.

Q. How long were you on the job, Mr. Cochrane?

A. Until the [295] latter part of July, from

(Testimony of Alexander Cochrane.)

somewhere—I would say I was backward and forward from about the middle of November until the first of the year, until the end of December, 1939, and then after that I was on the job all the time until the latter part of July.

Q. What was the state of the job when you left, generally? What was the condition of Abutment 1?

A. Abutment 1 was complete.

Q. How about Abutment 2?

A. Abutment 2 complete.

Q. How about Pier 1?

A. Pier 1 complete.

Q. How about Pier 2?

A. About, I would say, 35 per cent. complete.

Q. Pier 3?

A. Pier 3 was not over 10 per cent. complete, just the base.

Q. And Pier 4?

A. Nothing—no concrete poured, just the grading.

Q. And Pier 5? A. Grading.

Q. Pier 6? A. Grading.

Q. Pier 7? A. The base poured.

Q. Abutment 3?

A. If it wasn't complete, it was very nearly complete.

Q. Pier 8? A. Complete.

Q. Pier 9? A. Nothing poured.

Q. Pier 10? A. Complete.

Q. And Abutment 4?

(Testimony of Alexander Cochrane.)

A. I think that was practically complete, too.

Q. Directing your attention to Abutment 1, that was the one with the tunnel through it, was it not?

A. Yes, sir, that was the connection to the tunnel.

Q. There was falsework in there?

A. Falsework, yes, sir. [296]

Q. And the labor of putting in that falsework and bracing to hold the tunnel—

A. Yes, sir.

Q. And concrete poured—

A. Yes, sir.

Q. The labor charges and the material charges that went into this job up to the time that you left, were they paid for by the Union Paving Company?

A. Yes, sir.

Q. Did you at any time have any instructions from Mr. Dowling that they should be charged to the Soule Steel Company? A. No, sir.

Q. Up until the time you left you never received any instructions of that kind? A. No, sir.

Q. They were bought and paid for by the Union Paving Company?

A. So far as I know, they were bought and paid for by the Union Paving Company.

Mr. Moore: I think that is all.

Cross-Examination

Mr. Wrigley: Q. Mr. Cochrane, you and Mr. Soule have been friends for many years, haven't you? A. Yes, sir.

(Testimony of Alexander Cochrane.)

Q. When I say many years, how many years have you been friends?

A. Well, Mr. Soule—he has been subcontracting work for firms that I have been superintendent for for twenty years or more that I know of.

Q. Didn't you for a time work for Soule Steel Company?

A. I never worked for Soule Steel Company one day in my life.

Q. Since August, 1940 Soule Steel Company has not been paying you money?

A. Soule Steel Company never paid me one cent in their life.

Q. From January 1, 1940 to July 1st what was the condition of your health?

A. It was good up until about the latter part of June. [297]

Q. As a matter of fact, weren't you quite sick the early part of that year?

A. No, I had a cold with three days off. We had a lot of rain and got rather wet trying to push the job, and I was off for about three or four days.

Q. Do you remember the automobile accident that you and Mr. Hunt had up there?

A. I do, distinctly.

Q. Can you give us the date of that?

A. No, I couldn't. I couldn't set that. I remember the accident distinctly. We were coming home from work about nine o'clock one evening.

Q. That was in April, wasn't it?

A. I think it may have been around that time.

(Testimony of Alexander Cochrane.)

Q. And you were injured, weren't you?

A. I got a little crushed in the breast.

Q. And from that time on were you ever well on that job? A. Yes, sir.

Q. Isn't it a fact that in June you were ordered to San Francisco and you came to San Francisco about July 1st and had all your teeth taken out?

A. No, sir, I was not ordered to San Francisco in June.

Q. What date did Mr. Hunt bring you down?

A. Mr. Hunt brought me down about the third week in July, about the 17th or 18th of July.

Q. That was the last time, wasn't it?

A. I went back on the job one more week after that.

Q. Didn't you come down about the first of July?

A. Yes, it was agreed by Mr. Dowling that I would get about a week off. I had been putting in twenty-four hours a day, seven days a week, and I think that will depress any man, I don't care who he is.

Q. Do you remember how you came to San Francisco on that trip?

A. I think I drove down in Mr. Dowling's machine—no, I [298] didn't. I left it up there. The machine was left. I came by bus.

Q. That was about the 1st of July?

A. I was here in the City of San Francisco, it was the 2nd of July, on a Tuesday, and if my memory is correct, I think the 4th was on a Thursday.

(Testimony of Alexander Cochrane.)

Q. And wasn't that after the Government engineers began complaining about you on the job?

A. I never had no Government engineer complain to me personally on the job, so, therefore——

Q. No complaint to Mr. Dowling?

A. Mr. Dowling can probably answer that.

Q. Didn't Mr. Dowling tell you about that?

A. No, he didn't tell me about that. Mr. Dowling advised me to go and take a few days off and I would come back and be fresh for work the following Monday.

Q. After you took a few days off you came back again?

A. I did.

Q. How long did you stay then?

A. About one week and one day.

Q. Didn't the Government engineer again request that you be taken off that job?

A. I don't know, not to me. That is something I got no knowledge of whatever. If they requested that of Mr. Dowling, that is up to Mr. Dowling.

Q. Did Mr. Dowling tell you that the Government engineers had complained?

A. No, sir, he did not.

Q. Didn't you ask Mr. Dowling if you couldn't go to the Government engineers and talk the matter over with them?

A. After I was in San Francisco in his office—Mr. Hunt brought me down—I think it was Tuesday—I was getting my teeth out. Mr. Hunt called me up and made an appointment for me to see Mr. Dowling in the afternoon, I think, of the next day,

(Testimony of Alexander Cochrane.)

Wednesday, and then Mr. Dowling did remark something [299] to me about the Government engineers thought I might be better off the job.

I said, "I am going back to find out the reason." Which I did. And I talked personally with Mr. Jackson, the Government engineer, and I asked him if there was any objection to me on the job. I will say that I wasn't feeling a hundred per cent in health—

Q. As a matter of fact, you weren't well at that time?

A. I wasn't too bad, but I wasn't feeling right. I wasn't myself, I will admit, and Mr. Jackson said he didn't care. Whatever Mr. Dowling said to him, it didn't matter, as long as the job was successful. I had been there and I had been all right—probably I wasn't feeling all right—but if I could handle the job, he would be behind me to stay. That was Mr. Jackson's word.

Q. Didn't both Mr. Jackson—I believe he is referred to as Speed Leonard—point out to you the job was behind in schedule at that time as to every pier, with one exception?

A. Mr. Jackson and Mr. Speed Leonard was the Government engineers on the job—pointed out to me long before that our equipment—for instance, this is one illustration—our equipment on the job—the bunkers and the plant were supposed to be on the job on January 15th. It arrived about March 15th. If that isn't putting the job behind, I don't know what it is. It was no fault of ours on the job.

(Testimony of Alexander Cochrane.)

Q. When you refer to the bunkers, weren't the bunkers up there before that and the storm came and washed them down the hill?

A. The bunkers might have been, but the plant and the conveyor, taking the thing to the mixing batch—they weren't there.

Q. Didn't the whole Columbia plant at Redding get washed out so [300] they couldn't furnish concrete aggregate until long after that?

A. Not while I was there.

Q. When did they complete the rebuilding of the Columbia plant and the bridges to furnish concrete aggregate?

A. Just about the same time as—I think about the same time as we completed our bunkers, but in our visits down to the Columbia plant, they always told us if we need the material, you will have it. We got no satisfaction if they wouldn't supply the material. I think Mr. Dowling and myself personally made two trips down there.

Q. Didn't the Union Paving Company take concrete aggregate, sand, gravel from the Columbia plant to this job the very first day it was possible to get it?

A. They probably did.

Q. And didn't they take it out of there before the bridges going over to the Columbia plant were fully completed?

A. Well, I don't know. The only way I know they could get it out was by coming over the bridges.

Q. And those bridges were all washed out that winter by the rain, weren't they?

(Testimony of Alexander Cochrane.)

A. I think they were, if I remember rightly. Quite a few of them up there washed out.

Q. And the very first day it was possible to get out of that plant, Union Paving Company started hauling sand and gravel from it to their bunkers, didn't they?

A. I would say it was pretty close when they were ready, yes.

Q. How do you fix the date of that conference at Mr. Soule's office when these writings were changed as December 29, 1943?

A. I think Mr. Hunt received the message on December 28th asking me to report in San Francisco the next day.

Q. Where were you at that time?

A. At Redding.

Q. You were at Redding with Mr. Hunt, weren't you? A. Yes, sir. [301]

Q. On the 28th of December you were at Redding with Mr. Hunt, weren't you? A. Yes, sir.

Q. Now, on the 27th and 28th of December—the 28th of December to be exact—didn't Mr. Hunt receive from Mr. Dowling in San Francisco and go over with you a draft and notes of a proposed contract?

A. No, sir. Mr. Hunt received something like that, but I was gone before that arrived by mail.

Q. Showing you a writing consisting of a blue slip and three yellow sheets, on which there is contained a notation at this time, "Plaintiff's Exhibit

(Testimony of Alexander Cochrane.)

E, Frank L. Hart, Reporter," weren't you at Redding when that came up? A. No, sir.

Q. And you did not go over it with Mr. Hunt?

A. Not that day.

Q. When did you go——

A. The mail comes in eight or nine o'clock in the morning and I left on the ten o'clock a. m. train.

Q. What date?

A. December 28th. I remember seeing that in the Union Paving Company's office on December 30th.

Q. Now, didn't Mr. Hunt have that with the interlineations on and everything at Redding before you left there and returned to San Francisco?

A. No, sir, he did not.

Q. Did you have anything to do on that job at any time from the time you went up there until you left with the matter of sending out bills?

A. Every bill and account, I would say, up to practically the middle of June—maybe the end of June—had to have my O. K. before it left the Redding office.

Q. Did you send out any bills to anybody for anything during the time that you were there?

A. Not that I recollect—I don't think we sent out very many bills out of our office. The bills were sent from the main office in San Francisco. There might have been a minor bill or two. I don't know.

Q. Did you keep any records there of the time of the men, the [302] material, or anything?

A. That was Mr. Hunt's job entirely.

(Testimony of Alexander Cochrane.)

Q. It was Mr. Hunt's, not yours?

A. No, sir. I wasn't the bookkeeper nor the accountant.

Q. Now, in the month of November, 1939, you were in the employ of Union Paving Company, weren't you? A. Yes, sir.

Q. And you were in the employ of the Union Paving Company at the various times when various people were submitting bids to do this work, weren't they? A. Yes, sir.

The Court: We will take a recess for a few moments.

(Recess.)

Mr. Wrigley: Q. Mr. Cochrane, just before the recess, as I undertood your testimony, you knew Mr. Dowling had consulted you with reference to the various bids he had received from various people for the reinforcing steel and other work up there? A. Before the bids went in?

Q. Yes. A. Yes, sir.

Q. No, before the bids went in and after the bids went in.

A. Yes, sir, all the time.

Q. And in particular, he showed you a bid from Sherwood S. Cross, didn't he?

A. I don't recollect of him showing me that bid, but I will say that before the bids were opened in Sacramento we got a bid around \$24 from someone around Los Angeles—might have been the same gentleman—but Mr. Dowling didn't know we had that

(Testimony of Alexander Cochrane.)

bid, because I considered it way too low to put up that falsework, and he never knew we had that bid until he came back from Sacramento.

Q. When did he come back from Sacramento?

A. Probably that evening, probably the five o'clock train. I remember Mr. Dowling came out to the Presidio the next morning and met me.

Q. What date was the bid opened the next morning.

A. October 5, [303] 1939.

Q. I will ask you to look at that bid of Mr. Cross and see if that is correctly dated October 12th and was received approximately October 14th?

A. We might have gotten this one afterwards. We got several quotations afterwards from different people.

Q. So Mr. Dowling could not have had this bid on October 5th or 4th?

A. No, sir, not if it is dated the 12th.

Q. And Sherwood S. Cross is a recognized contractor here on this Coast, isn't he?

A. I don't recollect the man. Heard the name before.

Q. And his offer was shown to you later, wasn't it?

A. I don't recollect. It probably was. I don't remember the contents of it, at all.

Q. And didn't Mr. Dowling tell you that he had a bid of \$24 for erecting the reinforcing steel complete, including the supporters or whatever was necessary to support that steel?

(Testimony of Alexander Cochrane.)

A. I imagine that if Mr. Dowling had that, him and I would converse on the subject, because him and I were the only two that were doing the subletting.

Q. Going back to December 8, 1939, you and Mr. Hunt were together at the Redding office, weren't you? A. I think we were.

Q. And on that date you and Mr. Hunt discussed the matter of a subcontract for this steel work, didn't you?

A. Probably we did. I don't recollect. Probably we did.

Q. And isn't it a fact that after your discussion Mr. Hunt wrote out and you looked it over and you sent to Mr. Dowling a memorandum of situations to go into the contract?

A. No, I wouldn't say it was a fact. I don't remember anything like that.

Q. Showing you this carbon copy of a writing purporting to be [304] dated December 8, 1939, "Memorandum to Mr. J. A. Dowling; Subject Steel Contract," consisting of two pages, I ask you to read that over.

A. It looks to me probably—Mr. Hunt and I were together—we discussed something like that that pertained to how the job was sublet to the Soule Steel Company.

Mr. Wrigley: At this time I ask that this be marked for identification only.

(The document was thereupon marked "Defendants' Exhibit YY for Identification.")

(Testimony of Alexander Cochrane.)

Mr. Wrigley: Q. Showing you, Mr. Cochrane, a picture, I ask you if you can identify that.

A. I think this would be Pier 3 in the process, just about when I left the job, Mr. Wrigley. That is Pier 3.

Mr. Wrigley: I would ask that this be marked for identification.

(The photograph was thereupon marked "Defendants' Exhibit ZZ for Identification.")

Mr. Moore: Introduce it. We will have no objection.

Mr. Wrigley: I will introduce it then for ease in marking it.

(Defendants' Exhibit ZZ for Identification was thereupon received in evidence.)

Mr. Wrigley: Any objection to marking this last one? I wanted to prove it by Mr. Hunt.

Mr. Moore: I want to look at it.

Mr. Wrigley: That is all right.

Q. Referring now to this picture marked Defendants' ZZ, which you have identified as Pier 3, which is the first pier immediately to the south of the Pit River, I will ask you to examine that again and tell us whether those are not the concrete mixers [305] shown just above the steel work, there?

A. It is self-evident they are.

Q. That is a fact, isn't it? Now, those concrete mixers were used to pour the concrete in the base, weren't they? A. Yes.

(Testimony of Alexander Cochrane.)

Q. Was any staging necessary to pour that concrete in the base? A. Yes.

Q. How was that concrete transported from those mixers down?

A. It was transported through a chute into a hopper that I would say off-hand was 25 feet below those mixers, and then the contents of that bottom hopper was dumped into what we call industrial cars, and they were run onto tracks and deposited through elephant trunks into the base of the pier.

Q. I will show you this picture, Mr. Cochrane; can you identify that?

A. No, that was after I was gone.

Q. You can't identify this picture, then?

A. No.

Q. Calling your attention in this picture to the hoist with the long boom on it, wasn't that there all the time that you were there?

A. The Soule Steel Company had a machine with a boom similar to this. I don't know whether this is the one, or not.

Q. Can you identify this picture?

A. No, sir. That was after my time.

Q. Was this picture after your time, also?

A. There is nothing there that shows that I can identify.

Q. Now, Mr. Cochrane, with reference to the electric signal system, that was installed on the various towers when you were there; that was the signal system used by the various men signalling to hoist the reinforcing steel up to place, wasn't it?

(Testimony of Alexander Cochrane.)

A. I don't know. I had nothing to do with the hoisting of the reinforcing steel. We only hoisted the concrete in our tower. [306]

Q. The electric signal system, for instance, on Pier 3 was used when the Soule Steel men wanted to signal the men below to hoist the steel, and so on?

A. While I was on the job, Mr. Wrigley, Pier 3 was only about ten feet off the ground. Everything was going down. There was no electric system in Pier 3 while I was there.

Q. Do you keep any record or diary of your various trips with Mr. Dowling out to the Soule plant?

A. In my mind I have a record; I have no data, no, sir.

Q. Did you make any written record of it?

A. No, sir.

Q. Do you remember how many trips you went out there with Mr. Dowling? A. Yes, I do.

Q. How many? A. Three.

Q. And the first one was what date?

A. The 17th of November.

Q. And the next one was——

A. On the 18th of November.

Q. On the next?

A. It might have been the 16th or 17th. I might be a day off—no more.

Q. And isn't that the date that the drawings were made out there showing that Soule Steel was going to use a certain type of reinforcing to hold up that reinforcing steel? A. No, sir.

Mr. Wrigley: That is all.

(Testimony of Alexander Cochrane.)

Redirect Examination

Mr. Moore: Q. What did occur at this meeting of November 16th or 17th?

A. Mr. Dowling and myself went out to see the application of the welding of the bars. Mr. Soule had pieces about this long set up just in relation to where they would be in the pier, just to find out how—it being in the steel contract to furnish clamps to hold those bars in place—it was just the method of procedure to see what would be the best clamp to hold them and still let the welder in to do his [307] work.

Q. And was there a test made there?

A. Yes, sir.

Q. At that time was there any discussion of the contract?

A. No, sir, not to my recollection; nothing discussed about the contract.

Q. At the time was this drawing displayed?

A. Never saw that drawing until December 29th.

Mr. Moore: That is all.

The Court: Step down.

Mr. Moore: We would offer, your Honor, and ask that it be opened, Mr. Dowling's deposition, which has been returned to this court by the notary public who took it.

Mr. Wrigley: We make the same objection to that; it is not admissible as a deposition. He is here

personally in court. Further than that, the major portion of that deposition is an attempt to go into matters occurring during the period of negotiations prior to the 6th day of January, 1940, and therefore is incompetent, irrelevant, and immaterial under Section 1625 of the Civil Code.

Mr. Moore: That is the same objection that has been urged, and I believe the deposition of a litigant can be introduced, your Honor.

Mr. Wrigley: I know of no rule of the Federal Court allowing a deposition to be introduced.

The Court: What is the purpose of introducing this?

Mr. Moore: Largely impeachment, to show a difference in the story that Mr. Dowling told then and the one he is telling now on the witness stand.

Mr. Wrigley: I submit it is not admissible under the [308] Federal Rules. They may use it to examine or cross-examine him while he is a witness on the stand, but to introduce a deposition as a whole, I know of no basis for it under the Federal Rules.

Mr. Moore: I would like to take a look at the rules on that, your Honor. In state practice it is proper, I am certain.

Mr. Wrigley: Both state practice and federal practice are quite specific that you have no right to admit it.

The Court: I will give you an opportunity to look that up.

Mr. Moore: Thank you. That is our case, then, your Honor.

LOREN HUNT

called as a witness on behalf of defendants in surrebuttal, having been previously duly sworn, testified as follows:

Mr. Wrigley: I do not find my notes handy, but maybe Mr. Moore has in mind, and no objection, that on the first day of the hearing I introduced certain letters and had them marked for identification. They were so introduced and marked for identification, but were not offered in evidence. Do you want me to point those out specifically?

Mr. Moore: I do not think it is necessary.

Mr. Wrigley: They are before the Court and have been read, but only marked for identification. We offer those.

The Court: The Clerk has them. If there is no objection, they will be admitted.

(The documents heretofore marked Defendants' Exhibits C, G, and H For Identification were thereupon received in evidence.) [309]

Mr. Wrigley: Q. Mr. Hunt, showing you what has been marked Defendants' Exhibit YY For Identification, I will ask you if that is a correct copy of the writing drawn up by you in conference with Mr. Cochrane at Redding and sent to Mr. Dowling?

A. That is.

Q. At the time that it was drawn up, the provision that all staging to be furnished by the subcontractor here—was that discussed with Mr. Cochrane?

(Testimony of Loren Hunt.)

A. All matters in that were discussed with Mr. Cochrane.

Q. Did he have any suggestions that were other or different than that at the time?

A. No, that was the meat of the discussion.

Q. After this was written up did he go over it before it was sent to Mr. Dowling?

A. I am sure he did.

Mr. Wrigley: We offer this as Defendants' Exhibit YY.

Mr. Moore: No objection.

(Defendants' Exhibit YY For Identification was admitted into evidence.)

Mr. Wrigley: Q. Now, was Mr. Cochrane at Redding at the time you went into the later draft of a contract specifically with Soule for this job?

A. In reference to that you have in your hand?

Q. Yes.

A. I believe he was there when it arrived.

Q. Did you have any discussion with him as to its contents or provisions?

A. I had discussions with Mr. Cochrane on everything that came in.

Mr. Moore: I ask that the answer go out as not responsive.

The Court: It may go out.

Mr. Wrigley: Q. Asking you specifically with reference to this actual document—

A. I believe I did. [310]

Mr. Wrigley: For the purpose of the record, I

(Testimony of Loren Hunt.)

would ask that this be marked for identification at this time.

(The document was thereupon marked "Defendants' Exhibit AB For Identification.")

Mr. Wrigley: Q. Mr. Hunt, from the notations appearing on this writing, can you tell me the date it was received by you at Redding?

A. I would say it was received on the 28th.

Q. Can you say when you sent it back?

A. Probably the same day. It was received in San Francisco on the 29th.

Q. All mail came to you at Redding at that time? A. Central Valley.

Q. Well, mail at that time addressed to you or to Union Paving Company came to you, did it not?

A. That is right.

Q. Did Mr. Cochrane make any suggestions with reference to this writing before it was sent back by you?

A. No, it was mutually agreed on the writing, I am sure.

Q. I didn't get the answer.

A. It was mutually agreed on the writing.

Q. Let me ask you another question and maybe clear that up. When you refer to the writing, do you mean the typing that is on here, or the pencil writing that is on it?

A. The pencil notes that I put on it.

Q. Did you at that time or prior thereto have any discussion with Mr. Cochrane as to the expense of the interior falsework, or framework?

(Testimony of Loren Hunt.)

A. Prior to——

Mr. Moore: I am going to object, your Honor, to that on the ground it is incompetent, irrelevant and immaterial. What discussion they may have had I do not think has any particular bearing.

Mr. Wrigley: We take the position, if the Court please, [311] that Mr. Cochrane is their witness and an adverse witness, and that we have the right to impeach his testimony by showing that he discussed and agreed that the cost of that work was to be borne by the subcontractor.

Mr. Moore: He has testified in regard to a certain conversation that was had on December 29th. You come in here with a letter of December 8th, which is twenty days before you come in with another one. The witness is certainly very doubtful about receiving or discussing it with him, and there is nothing there that appears that Mr. Cochrane had anything to do with this particular letter. I think it is incompetent, irrelevant, and immaterial, even if they had a discussion. If these two men had a discussion with regard to this, I do not see how it could impeach Mr. Cochrane's testimony in the slightest, your Honor.

Mr. Wrigley: Mr. Cochrane has testified that Union Paving Company was not to bear that expense. Now, in impeachment of that, I want to show, both by Mr. Hunt and by Mr. Dowling, that at all stages——

Mr. Moore: I will withdraw my objection. Go ahead. I will withdraw the objection, your Honor.

(Testimony of Loren Hunt.)

Mr. Wrigley: Q. Have you in mind the question, Mr. Hunt, I was asking you?

A. About after this contract?

Mr. Wrigley: Would the reporter read the question, please?

(The question was read by the reporter.)

A. At that time—that is what I was questioning.

Mr. Wrigley: Q. Yes; did you have any discussion with him at that time as to who was to bear that expense?

A. At the time prior to January?

Q. No, at the time of this writing of December 27th, 28th, and 29th, 1939. A. Yes. [312]

Q. Did Mr. Cochrane say that Soule was to bear that?

Mr. Moore: I suggest that that is rather leading.

Mr. Wrigley: I beg your pardon. That is correct.

Q. What was said about the expense of the interior falsework or framework?

A. We would build a scaffolding over the base.

Q. Whom do you mean by “we”?

A. The Union Paving Company, but from there on up it belonged to the subcontractor.

Q. And you fix the date of that conversation as what date? When did that conversation occur?

A. That was prior to the 29th, immediately before he went to San Francisco.

Q. Was there any discussion at the time when

(Testimony of Loren Hunt.)

this particular writing came up as to who was to bear that?

A. The subcontractor was.

Mr. Moore: I ask that that go out.

The Court: It may go out.

Mr. Wrigley: Q. Not what you understood, but was there any discussion or statement as to who was?

A. I can't remember any definite statement.

Q. After December 8, 1939, when you drew the first memorandum which said, "All staging to be furnished by the subcontractor"—was there any discussion with Cochrane on that subject, at all?

Mr. Moore: I am going to object to this, your Honor, because this letter is exactly contrary to that, if it is read in its entirety. Mr. Wrigley takes one sentence out of the entire letter. If you want to read the letter, I will withdraw the objection.

Mr. Wrigley: Accepting counsel's suggestion, I will read the letter, the letter being dated December 8, 1939:

(The document referred to was thereupon read by Mr. Wrigley.) [313]

Mr. Wrigley: Q. At any time after December 8th was there any discussion between you and Mr. Cochrane to the effect that Union Paving Company was to bear all the expense of the interior false-work? A. No.

Q. Did Mr. Cochrane ever make any such statement to you or in your presence?

A. He made no statement that the Union Paving

(Testimony of Loren Hunt.)

Company was to bear the entire cost of the false-work.

Q. With reference to the lumber used in the spacers, who bought that lumber and paid for it?

A. The Union Paving Company.

Q. I am talking now about the spacers. How would that be removed?

A. It was necessary to cut them up into small pieces and pry them out.

Q. So was it ever possible to use any of that material for spacers over again?

A. No, but there may have been occasions where they might have gotten small parts of them. On the whole, they couldn't use them over.

Q. But the templates, until they were worn out or too short, might have been used over and over again as long as there were usable portions, is that correct?

A. That is correct.

Q. Now, who bought the lumber——

The Court: We went into this testimony fully, also the expense of the lumber used, whether or not it could be used again. There is no need for a repetition of that.

Mr. Wrigly: No further questions of this witness.

Cross Examination

Mr. Moore: Q. You say you discussed this letter here with Mr. Cochrane at the time of its receipt?

A. Yes, sir.

Q. Well, isn't it a fact that you placed a rubber stamp on it showing the date of its receipt?

(Testimony of Loren Hunt.)

A. Yes, sir.

Q. That is December 28th, isn't it?

A. Yes, sir. [314]

Q. Received at Redding. A. Yes, sir.

Q. What time does the mail get in?

A. Usually in the morning, around eight or nine o'clock.

Q. Eight or nine o'clock. Can you be more exact?

A. It is according to what time the trains get in.

Q. Those are the trains from San Francisco?

A. The trains come in four in the morning that the mail arrived on.

Q. When did you have this conversation with Mr. Cochrane about this particular letter?

A. In the morning.

Q. What time?

A. Right after we opened the mail.

Q. What time did you open the mail?

A. Say nine or ten o'clock.

Q. What day did Mr. Cochrane leave for San Francisco?

A. I think he left on the 28th.

Q. The 28th; the day of the receipt of the letter? A. Yes.

Q. He left on the morning train?

A. There was a train at one *one* o'clock.

Q. It is your recollection he went on the one o'clock train? A. It is.

Q. And that you talked this letter over with him in the morning? A. Yes.

(Testimony of Loren Hunt.)

Q. Referring to the letter of December 8th to Mr. Dowling, you wrote this letter, didn't you?

A. Yes.

Q. You say you discussed it with Mr. Cochrane?

A. Yes, sir.

Q. Isn't it a fact that at the time that this letter was dictated, you, as an engineer, were making various estimates of how to handle this job, conferring with Mr. Cochrane?

A. That is right.

Q. And you were rendering this memorandum to Mr. Dowling for his information, isn't that correct?

A. That is right.

Q. As a matter of fact, you and Mr. Cochrane discussed a [315] half dozen methods of handling the transaction, didn't you?

A. We discussed quite a few.

Q. And this letter was being furnished to Mr. Dowling for his information in negotiating possible contracts, isn't that correct?

A. That was sent to San Francisco probably on Mr. Dowling's request.

Q. It was sent in, and you and Mr. Cochrane had conferred as to the different methods of handling the job?

A. That is right.

Q. After you had done so, you wrote this out, after conferring with Mr. Dowling as to your ideas of what should be embodied in the contract?

A. That is right.

Mr. Moore: That is all.

J. A. DOWLING,

recalled as a witness for defendants in Surrebuttal, having been previously duly sworn, testified as follows:

Direct Examination

Mr. Wrigley: Q. How many conferences did you have at Sacramento on or about October 4, 1939 with Mr. Soule with reference to a bid or a sub-bid of the work of the Pit River job?

A. My best recollection is he came up to my room about midnight of the 4th and woke me up, he and Mr. Mahon, and wanted to give me a bid, and I said I didn't want to talk about a bid then. Our items had all been filled in. And I would see him later if I was the successful bidder. We didn't arrive in Sacramento until eight o'clock or nine o'clock at night; went up on the five o'clock train and went right up and went right to bed. I didn't want to be annoyed, because the steel men and other salesmen around the hotel bothered you to death. I went right up and went to bed.

Q. Did Mr. Soule, or anyone on behalf of Soule Steel Company, [316] submit to you any figures on that day or the next day?

A. They did not. I particularly told them I did not want to take a bid, because I didn't want to be under any obligations to him or to anyone else until after we had gotten the job.

Q. Calling your attention to this particular drawing that has been marked "Plaintiff's Exhibit 22," have you examined it heretofore as I have rolled it out?

A. Yes.

(Testimony of J. A. Dowling.)

Q. When was the first time you saw this drawing?

A. When I was on thhe stand the last time.

Q. Did they ever have that drawing at any time when you were at the office of the Soule Steel Company?

A. They certainly did not. That of the Soule Steel Company was on brown paper, and not as wide as that.

Q. How wide was it?

A. I would say about two and a half feet wide, something like that.

Q. And about how long?

A. About ten feet.

Q. Was it fastened to the drafting table?

A. It was fastened to the drafting table, yes; never hung on the wall, either. It was always on the drafting board.

Q. Now, on that drawing were there any markings or anything showing the interior falsework or framework for supporting the reinforcing steel?

A. Yes, that was the idea of the drawing.

Q. What did it show?

A. Well, it showed various types or methods that might be used to support the steel.

Q. What date was that particular drawing that you have in mind?

A. That particular date was the 17th of November.

Q. How do you fix that date?

(Testimony of J. A. Dowling.)

A. I have it in my diary, a note of it.

Q. Who was present at that conference when that particular drawing was shown?

A. Mr. Soule, Mr. Dohrman, who drew it up on the [317] drafting board, and Mr. Stevens and Mr. Cochrane.

Q. You have your diary showing that was the 17th day——

A. 17th day—it was on a Friday. That was the day we went up to the Manning Coffee house and had lunch, came back, and spent the whole day there. We didn't leave until late that afternoon, and we went back Saturday morning.

Q. At that conference was there any discussion as to price? A. There was not.

Q. Did the drawing they had on that day show the staging or interior framework for the entire piers, one particular pier, or what?

A. Oh, no, just a sample pier.

Q. Any particular pier, type of pier?

A. No, there was no particular pier. They were just making up a pier. All those piers were practically the same, except as to size and height.

Q. Was there any sketching on that drawing as to the staging or interior falsework or framework above the base? A. Yes, there was.

Q. Was any conversation had as to who was to put it in at that time?

A. Yes, they were to put it in above the base of the piers, and we were to supply the cribbing to

(Testimony of J. A. Dowling.)

hold up the platforms at practically the ground level of the country up there.

Q. Coming down to the contract of January 6, 1940, was it your understanding at the time you signed that contract that you were to put up the framework, or that Soule was to put it up, or that the Union Paving were to put it up and Soule pay for it?

A. It was my understanding that anything above the base Mr. Soule was to be responsible for.

Q. And was that the discussion had at that time, or when? A. Yes. [318]

Q. Now, calling your attention to this particular writing which has been marked "Plaintiff's Exhibit 21," bearing date December 11, 1939, did you first receive that with or without the pencil interlineations?

A. Mr. Soule brought it into the office, and at the desk at the office, wrote that in.

Q. When you say the office——

A. Our office, the Union Paving Company office.

Q. What date?

A. That was on the 6th of January.

Q. He brought this in on the 6th of January?

A. Yes.

Q. As to this interlineation that appears here, was that made on that date or prior thereto?

A. Made on that date.

Q. Did this writing with the pencil interlineation—was it agreed to by you, accepted?

(Testimony of J. A. Dowling.)

A. Why, no. This contract that he signed—this was a proposed contract that I sent up there to have him look over and was drawn up long before this occurrence.

Q. Now, except as stated in that writing of January 6, 1940, did you agree to any of the provisions in this offer?

A. I didn't agree to anything at any time. They were very anxious to get me committed as early as they could.

Q. The various other bids that you testified to receiving—one of them is here in writing, the other is oral—did any of those bids provide or contemplate that Union Paving was to install the interior falsework or framework against which the steel was to rest?

A. Not from my interpretation of the bids.

Q. Was Mr. Cochrane ever a stockholder or officer or director of the Union Paving Company?

A. Never was.

Q. Was Mr. Cochrane present or consulted about your actual agreement signed on January 6, 1940?

A. He was not there at [319] the time.

Q. When was the first time that you learned that Soule Steel Company was not being charged for any of the interior falsework or framework?

A. At the time Mr. Morisette came up there and started to get the job straightened down a little bit.

Q. Now, with reference to the various later statements that were sent to Soule Steel Company,

(Testimony of J. A. Dowling.)

did Mr. Stoddard ever come down to your office before any of those statements were sent?

A. What do you mean?

Q. I will withdraw that question and reframe it. When was the first time Mr. Stoddard ever came down to your office and go over the figures as to the cost?

A. After we completed the job. He came down there a while himself and said it was too much, and sent one of his bookkeepers down.

Q. Approximately what day?

A. It was after the job was completed, shortly after the job was completed.

Q. He was never there at any time while the work was going on, to your knowledge?

A. No, he did not come in until the work was completed.

Mr. Wrigley: That is all.

Cross Examination

Mr. Moore: Q. Do I understand you now the first time you ever saw this letter of December 11th was when Mr. Soule brought it into your office on January 6th? A. Yes, sir.

Q. And the interlineations were made at that time?

A. Made in that office on that day, yes, sir.

Mr. Moore: I would ask that the witness' deposition be opened, your Honor.

The Court: You may open it.

Mr. Moore: Q. I will call your attention to your deposi- [320] tion, Mr. Dowling.

(Testimony of J. A. Dowling.)

Mr. Wrigley: What page?

Mr. Moore: Page 35, and then at page 40. Commencing at line 20:

“Q. Now, you have produced a memorandum, apparently unsigned, dated December 11, 1939, on the letterhead of the Soule Steel Products Company, with certain pencil memoranda thereon.

A. Yes, sir.

Q. Can you identify that handwriting that is on there?

A. I believe it is Mr. Soule's handwriting.

Q. And can you tell us when this particular document came into your possession?

A. I would say somewhere along the date it bears.

Q. Was that delivered to you by Mr. Soule, or how did it come into your possession?

A. Yes, Mr. Soule brought it into the office himself.

Q. He brought it into your office?

A. Yes.

Q. Have you any recollection of the circumstances under which he brought that in?

A. Well, he was trying to close the contract.

Q. At the time he brought it in were these pencil memorandums on it?

A. No, they weren't; they were put on in the office.”

Turning over to page 40, line 22:

“Q. And your recollection is that this document

(Testimony of J. A. Dowling.)

dated December 11th, which is 'Plaintiff's Exhibit D,' that was given to you about the time of December 11th, 1939?

A. Yes, about that time I would say.

Q. At the time it was given to you none of these interlineations were on there?

A. Yes, sir; he sat down in the [321] office and wrote them out right at the desk.

Q. And were they discussed?

A. Probably, more or less.

Q. Well, were they?

A. He just didn't come in and write them down and hand them to me. We discussed them back and forth. There is no question about it."

Q. Now, you gave that testimony, didn't you?

A. I did.

Q. Was this delivered to you now on January 6th or December 11th?

A. Well, it might have been given to me, and probably was given to me on the 11th, sent on probably by mail or something else, I don't know, but the changes were not made in it until the date he came in the office.

Q. You desire to change the testimony you gave in that connection? A. Yes, sir.

Q. I will ask you if this is not your testimony page 41, line 9:

"Q. And each subject matter was discussed, and was there an agreement reached between you and he?

(Testimony of J. A. Dowling.)

A. No, there was no agreement reached until the day we signed the contract.

Q. Well, for instance, take paragraph 3 here: 'We are to be responsible for the unloading, checking and handling of said reinforcing steel upon arrival at Redding upon a lot to be provided by you.' And then 'you' is marked out, and 'us' is inserted. '(We estimate the storage lot size should be about 150' x 350' and adjoining a rail track.)' That is scratched out.

A. Let me see.

Q. 'the rental of which shall not exceed \$30.00 per month.' That has been written in.

A. All of that entirely is Mr. Soule's writing in pencil. There is none of my writing there.

Q. Was that change discussed with you?

A. That change? [322]

Q. Yes. Did you discuss about the lot?

A. Yes. That wasn't a change. I had rented the lot for \$25.00.

Q. I mean his drawing a line through there, and writing that on there, didn't that meet with your accord at the time?

A. Yes. This is one of the paragraphs—this includes one of the paragraphs of the contract providing for the unloading and warehousing and taking care of the material, and I had made arrangements for a lot there—for Mrs. Kite's lot at \$25.00 a month. In fact, I believe that day I was up there I brought Mr. Soule down and showed him the lot.

Q. Now, paragraph 5 reads: 'You are to provide an easy and accessible roadway from the main high-

(Testimony of J. A. Dowling.)

A. That we proposed——

Q. The type that you proposed to use, yourself?

A. No, sir, the method that Mr. Soule was going to use to support the steel. [324]

Q. Let us not fence with words. Was it his idea to put 10 by 10's in?

A. No, not in the base of the hole. That was ours.

Q. Well, anywhere along the line.

A. I don't know. He made the various types—Mr. Cochrane was the 10 by 10 man, and that was only for the base of the hole. Beyond that and above that it was entirely up to Mr. Soule.

Q. But you went out later and bought old second hand steel rails and used them all the way through there?

A. It was a good deal cheaper than the other method.

Q. You did not consult Mr. Soule about it, did you?

A. No.

Q. You went ahead and got permission of the United States authorities to put steel rails in in place of the 10 by 10's?

A. Yes, you are correct in that.

Q. Because using the 10 by 10's, they would have to be pulled out afterwards and the cavity filled with concrete?

A. That is correct.

Q. From the standpoint of pouring concrete, it would have been much more satisfactory to have

(Testimony of J. A. Dowling.)

the steel remain in there because in a sense that would be reinforcing steel, itself?

A. That is correct.

Q. And you bought those steel rails without ever consulting Mr. Soule? A. Yes, sir.

Q. As a matter of fact, in your testimony given the other day didn't you state that you knew these monthly billings from Soule were being rendered to you and your company was expending money?

A. Yes, sir, up to July.

Q. You knew right from the beginning your company was paying bills for material that was being used in the falsework and framework up there, did you not? A. Yes, sir.

Q. Not after the job had gotten under way after Mr. Morisette was [325] there, but you knew it from the date the job was started?

A. Yes, about the middle of March.

Q. They went through your office?

A. Yes.

Q. And you paid those bills?

A. The bills were paid.

Q. And you never consulted Mr. Soule about them?

A. No, I consulted Mr. Stevens in July as soon as Mr. Morisette came up there and got straightened around and organized.

Q. You never talked with Mr. Soule in your life about any obligation on his part to put these in until after you had served notice on him or caused notice to be served on him in October, that

(Testimony of J. A. Dowling.)

if he did not proceed with the placing of this, you were going to terminate his contract?

A. I never told him I would terminate his contract. I don't believe that.

Q. You saw the letters introduced here over Mr. Lawton's signature?

A. I do not recall that, but I imagine what it was, we were going to go ahead and do it and charge it to his account.

Q. You were going to take over his contract?

A. Yes.

Q. Up to that time had you ever spoken to Mr. Soule personally about this matter?

A. No, but I spoke to his man who was on the jobsite right along.

Q. Why didn't you go right straight to Mr. Soule, who signed the contract?

A. That might have been the better thing to do, but the man was on the job and conversant with everything that was going on there, and was on the job regularly.

Mr. Moore: I think that is all, your Honor.

The Court: Step down. Is that the case gentlemen?

Mr. Moore: That is our case, your Honor.

Mr. Wrigley: Yes. At this time I want to renew my motion to strike out in its entirety the testimony of Mr. Mahon, the testimony of Mr. Soule, the testimony of Mr. Stevens, and also [326] the rebuttal testimony on behalf of Hunt, Morisette, and Dowling as to the conversations with respect

to offers that were had prior to January 6, 1940, on the ground that they were all merged into the written contract, and that you have no right to vary, or change, or consider the terms of a written contract where the parties have reduced it to writing.

The Court: You may reserve your motion on that, and I will give you an opportunity to argue that at the proper time.

Mr. Wrigley: Yes, your Honor.

The Court: Is the matter submitted?

Mr. Wrigley: The matter is submitted.

The Court: The evidence is now submitted on both sides?

Mr. Moore: Yes, your Honor—on our side.

Mr. Wrigley: Yes.

The Court: Submitted. Now, in what manner do you want to dispose of it?

Mr. Moore: I would just as soon argue it orally, your Honor.

(After a brief discussion, the matter was set for Monday, April 19, 1943, at 2:00 o'clock p. m. for argument.) [327]

Mr. Wrigley: Mr. Stevens on the stand has admitted that the spacers, separators, templates was clearly their work. The evidence showed they did not buy any lumber for that, and I think the evidence shows pier 4, which was the last and the biggest pier there, the labor of putting up those spacers and templates was all furnished by the Union

Paving Company, and they were not paid for that.

The Court: What did that amount to?

Mr. Wrigley: That amount has never been shown.

The Court: How do you expect this court to determine it?

Mr. Wrigley: I will say the burden is on them to show they have done it or they have not earned \$22.50. In other words, they have got to show that they have performed to earn \$22.50, and they have not shown it yet. But keep in mind that under Section 21 of the Master Contract, which is in evidence, it is provided, "The contractor shall begin work within thirty calendar days after date of receiving notice to proceed," (reading).

Section 22 of the contract goes on to provide a penalty of \$100 a day per unit, and the statement in evidence shows that the contractor has been charged \$46,000 here because of delays.

The Court: How many of those days were put on Soule?

Mr. Wrigley: I wouldn't know how to answer that.

The Court: How do you expect me to answer it?

Mr. Wrigley: We do not accept that, frankly, and I introduced evidence upon it—they are attempting to charge too much penalty for delay; but the fact is at all times after Mr. Morisette went up there in June until they were through he was continually after the Soule Steel Company to cooperate to hurry it, to expedite it, and there was some delay, some amount—I am not saying how much,

because I do not think it is material now—chargeable to Soule Steel Company for delay.

The Court: So that you are not misled, if you are not able to determine it, you can't expect this Court to determine it.

Mr. Wrigley: I do not expect this Court to determine it, because we at this time do not——

The Court: You have submitted your case here on the record. I do not want to mislead you. I would be idling your time as well as mine.

Mr. Wrigley: But my point is this: Mr. Moore said that a certain amount is too much money held back because of false work. We say at the time that money was held back, it was held back not only because of the interior falsework, but because of a claim of damages for delay, and the letters so show. We will take the letter of February, 1941—February 15th, if I remember the date—which showed specifically at that date that there were certain charges for various items aggregating in all \$41,000, and in addition to that sum, it did not include a claim of damages against Soule for having delayed the performance of the job. That was one of the bases for the countercharges at that time, as pointed out in that letter.

(Mr. Wrigley continued his argument, at the conclusion of which the following occurred:)

The Court: The Court is prepared to dispose of the case, unless there is some other matter you want to submit.

Mr. Moore: No, your Honor.

The Court: It will be the judgment of the Court

that the plaintiff prevail in this case. Now, there is an answer and a cross-complaint here that will have to be disposed of. I do not know anything that has been proved here that I can give any credit for in that respect. If there is anything you can point out, you may do so. Prepare your judgment.

Mr. Moore: Yes, your Honor.

The Court: You had better prepare findings, so there is no question about it.

Mr. Moore: I will prepare findings.

Mr. Wrigley: The matter of findings—I presume you will prepare them?

Mr. Moore: I will prepare them.

Mr. Wrigley: It will be submitted to me?

Mr. Moore: Very well.

[Endorsed]: Filed April 19, 1943.

[Endorsed]: No. 10571. United States Circuit Court of Appeals for the Ninth Circuit. Union Paving Co., a corporation, Pacific Indemnity Company, a corporation and Maryland Casualty Company, a corporation, Appellants, vs. United States of America, for use and benefit of Soule Steel Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed September 27, 1943.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10571

UNITED STATES OF AMERICA, for use and
benefit of SOULE STEEL COMPANY, a cor-
poration,

Appellee,

vs.

UNION PAVING CO., a corporation, PACIFIC
INDEMNITY COMPANY, a corporation, and
MARYLAND CASUALTY COMPANY, a
corporation,

Appellants.

STIPULATION DESIGNATING PARTS OF
THE RECORD TO BE PRINTED

It is hereby stipulated by and between the parties
to the above entitled action that those parts of the
record on appeal hereinafter described be printed,
and the Clerk of the above entitled Court is re-
quested to cause to be printed and reproduced in the
printed record those parts of the record which the
parties hereby designate as follows:

1. Complaint.
2. Association of Attorneys.
3. Answer and Cross-Claim of Defendants.
4. Answer to Cross-Claim.
5. Amendment to Answer to Cross-Complaint.
6. Order denying defendants' motion to strike
certain testimony.

7. Findings of Fact and Conclusions of Law.
 8. Order judgment entered in favor of plaintiff on findings and defendants take nothing on Cross-Claim.
 9. Motion to fix costs with Cost Bill.
 10. Judgment.
 11. Association of attorney for defendants.
 12. Motion for new trial.
 13. Order denying motion for new trial.
 14. Notice of appeal by defendants and cross-complainants.
 15. Reporter's transcript of April 8, 9, 15 and 16, 1943, pages 1 to 327 inclusive, and remarks of Court and Counsel at time of ordering judgment.
 16. Appellants' designation of contents of record on appeal.
 17. This stipulation.
 18. Plaintiff's exhibits 9, 10, 11, 16, 21 and 23.
 19. Enclosures accompanying exhibit 12, but not the exhibit.
 20. All monthly statements or estimates submitted by Soule Steel Company, omitting therefrom the captioned part of the bill but including the tonnage of steel and the price.
 21. Defendants' exhibits K, X, II, OO and WW.
- Those exhibits introduced by the parties hereto and which are not herein designated to be printed or reproduced in the printed record are omitted either because they are large drawings, charts, photographs and bulky tabulations which have, by order of the District Court, been sent to the United States

Circuit Court of Appeals for the Ninth Circuit for its inspection and use upon this appeal and which it would be impossible or impracticable to reproduce in the printed record but which, subject to objections, if any made when introduced, it is stipulated may be considered by said Court of Appeals in deciding this appeal.

This stipulation is made pursuant to subparagraph 6 of Rule 19 of the United States Circuit Court of Appeals for the Ninth Circuit and it is stipulated by the parties hereto that the parts of the record which it is hereby stipulated shall be printed will contain all parts thereof which are necessary or material to a consideration of the points upon which appellants will rely on this appeal, except exhibits hereinbefore mentioned consisting of large drawings, charts, photographs and bulky tabulations which it is impossible or impracticable to print or reproduce in the printed record; provided, however, that should anything material to either party be omitted from the printed record by error or accident or should anything be misstated therein, the parties hereto stipulate and agree that such omission or misstatement shall be corrected and, if necessary, that a supplemental record shall be printed.

Dated: August 31, 1943.

HENRY F. WRIGLEY

DION R. HOLM

Attorneys for Appellants

THELEN & MARRIN

COURTNEY L. MOORE

Attorneys for Appellee.

Good cause therefor appearing, Ordered original exhibits not included within printed transcript may be considered by the Court in their original form.

WILLIAM DENMAN

United States Circuit Judge.

[Endorsed]: Filed Sept. 27, 1943. Paul P O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLANTS' CONCISE STATEMENT OF
POINTS ON WHICH THEY INTEND TO
RELY ON APPEAL AND DESIGNATION
OF PARTS OF RECORD APPELLANTS
THINK NECESSARY FOR THE CONSID-
ERATION OF SUCH POINTS

Pursuant to the provisions of Paragraph 6 of Rule 19 of this Court, appellants above named file as a concise statement of the points on which they intend to rely on this appeal, and designate the hereinafter mentioned parts of the record which appellants think are necessary for the consideration of such points:

1. The District Court erred in holding that plaintiff recover damages for an alleged breach of a written contract when plaintiff was aware that the breach occurred when more than 50 per cent of the work to be done under the contract had not been performed, and plaintiff failed to give notice of rescission and failed to rescind the contract.

2. The District Court erred in giving judgment to plaintiff when plaintiff admitted it was notified in October of 1940, when less than 50 per cent of the contract was completed, that plaintiff was to pay the cost of constructing the falsework or interior framework supporting the steel placed by plaintiff, and then continued with the contract, accepting all benefits thereunder, and made no attempt to rescind the contract. Defendants claim to have given this notice in July and September of 1940, when only about 17 and 37 per cent, respectively, of the work was done, but about these earlier dates there is a conflict; about the October date there is no conflict.

3. The District Court erred in giving judgment for plaintiff when the evidence disclosed plaintiff accepted payments from defendants in accordance with the contract after plaintiff was aware defendants expected plaintiff to pay for the cost of the falsework, when about 50 per cent of the job remained to be done and payments normally due plaintiff were withheld by defendants until the cost of the construction of the falsework had been offset.

4. The District Court erred in granting judgment to plaintiff when the contract between plaintiff and defendants called for the construction and placing of reinforcement bars, the material consisting of steel bars was furnished by the United States, about which were to be built piers, and which placing and construction of bars were to be done in accordance with the specifications of the contract

between defendants and the Bureau of Reclamation, United States Department of Interior, and allowed plaintiff to recover the cost of falsework or interior framework that was essential for the uses of plaintiff in placing the reinforcement steel bars and where plaintiff undertook and actually did the construction of the falsework during one day of the contract.

5. The following errors were committed by the District Court in admitting oral evidence tending to vary the terms of the written contract dated January 6, 1940, between plaintiff and defendants.

(a) Testimony by Witness Ross L. Mahon, (T. 108 to T. 112), in which he stated conversations held during October 1939 between J. A. Dowling, the then manager of Union Paving Co., and Edward L. Soule, president of plaintiff company, one conversation being in Dowling's room at the Senator Hotel at Sacramento while Dowling was in bed, the substance of the latter conversation being, Soule quoted a price of \$33.80 a ton for the reinforcement steel to be installed, which included the cost of supporting structure for the steel. Objection to this testimony was made by Mr. Wrigley, then counsel for defendants, as follows:

Mr. Wrigley: I want to object to this as irrelevant, incompetent and immaterial. The parties in this case entered into a formal written contract as of January 6, 1940 that superseded all prior negotiations, discussions, offers and everything else, and anything they may have agreed prior to that date was carried into that contract and cannot be admis-

sible under the California Civil Code, Section 1625. (T. 108-9).

The Court: I will allow it subject to a motion to strike. (T. 109). * * *

Mr. Wrigley: May it please the Court, to save time, may it be understood that my objection goes to the entire line of examination without repeating it continuously?

Mr. Moore: It is so stipulated. (T. 109). * * *

Mr. Wrigley: At this time I want to move to strike out the entire testimony of this witness on the ground that it is an attempt to vary the terms of a written contract which the parties formally entered into at a later date. Section 1625 of our Civil Code of California provides that the execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning matters which preceded or accompanied the execution of the instrument.

The Court: I will allow it to go in so we can have a record on the ground of the witness not being available, and it is all going in subject to your motion to strike and your objection, and I will give both sides an opportunity to examine into the matter fully. (T. 112).

(b) During the cross-examination of J. A. Dowling he was asked by counsel for plaintiff as to a conversation held on December 29, 1939, in plaintiff's office as to how framework or falsework should be built and who should pay for it. (T. 167). The following occurred:

Mr. Wrigley: I object to that as incompetent, irrelevant, and immaterial, and an attempt to go back over a written contract, which is prevented by Section 1625 of our Code. The parties agreed to a writing, in which the obligations of each party were stated. An attempt to reopen that in order to vary the contract I say is objectionable. * * * (T. 168).

The Court: Pardon me. What was the date of the meeting?

Mr. Moore: December 9, 1939. (Meeting December 29, 1939.) * * *. (T. 170).

The Court: The objection may be overruled. You may answer. (T. 180).

After the overruling of the objection, testimony was received as to details of drawings, one of which, the witness testified was not the drawing submitted in Court which was supposed to show the false-work and which plaintiff claimed defendants agreed to pay for and erect, various bids made by plaintiff, letters concerning the basis of bid, all antedating January 6, 1940, the date of the contract, and the following occurred:

Mr. Wrigley: Just a second, Mr. Dowling. So the record will be clear, will it be stipulated, in the interest of time, that I object to this entire line of examination, that it all goes in subject to my objection and my motion to strike?

Mr. Moore: It will be stipulated. * * * (T. 182).

A letter dated December 11, 1939, plaintiff's Exhibit 21, that purported to contain the terms of the contract, was offered in evidence.

Mr. Moore: I will introduce this in evidence, your Honor.

Mr. Wrigley: Same objection.

The Court: Let it be admitted and marked. (T. 183).

(c) Through Witness Edward L. Soule (T. 211 to 224) testimony was elicited, over defendants' objection, as to conferences showing estimates and bids made by plaintiff prior to the execution of the contract, drawings made by plaintiff's representative, details as to the type of supporting devices, or falsework to be constructed, how the estimate was scaled down from \$30.00 a ton for the placing of the reinforcement bars to \$28.60, then further reduced by \$3.77 a ton (T. 216) representing the cost of the supporting devices, and a sum arrived at \$24.80 as plaintiff's bid. Discussions as to type of falsework, (T. 219) welding of the bars, and statements alleged to have been made by a representative of defendant company that (T. 220) defendants would assume the cost of the falsework.

All the foregoing testimony was admitted over defendants' objection, and how finally the bid price was lowered to \$22.75 and ultimately to \$22.50 a ton. (T. 222).

Mr. Moore: We also offer a copy of letter of December 11th produced by Mr. Soule and identified by him.

Mr. Wrigley: The same objection.

The Court: Same ruling.

(The document was received in evidence and marked "Plaintiff's Exhibit 23.") (T. 224).

(d) During testimony of Lester Earl Stevens (T. 279) plaintiff sought, and the witness testified as to estimate made, prior to the execution of the contract, for placing the reinforcement steel bars and the cost of the falsework to support them, and during which testimony the witness stated his estimates were first with the cost of the falsework and revised thereafter to exclude this cost.

This testimony was objected to, as follows:

Mr. Wrigley: I want to object to this as incompetent, irrelevant, and immaterial, attempting to vary the terms of a written contract.

The Court: The objection is overruled. * * * (T. 280).

Mr. Wrigley: Same objection to this entire line of examination.

The Court: Read the question, Mr. Reporter.

(Question and answer read.)

The Court: The objection is overruled.

Mr. Wrigley: Will you stipulate, Counsel——

Mr. Moore: I will stipulate.

Mr. Wrigley (continuing): ——that my objection runs to this entire line of examination, and I will in due course make a motion to strike out?

Mr. Moore: So stipulated. (T. 280-281).

(e) Testimony was offered by plaintiff through Alexander Cochrane (T. 291) as to conversations had in December 1939 regarding the preparation of a draft of a plan showing the falsework and reinforcement bars, the various sums suggested as the bid price of the work to be undertaken by plaintiff and that defendants agreed to pay for and con-

struct the falsework. This line of testimony was objected to by counsel for defendants.

Mr. Wrigley: I object to this as incompetent, irrelevant, and immaterial, and an attempt to vary the terms of a written contract in violation of Section 1625 of the Civil Code. (T. 291).

The Court: The objection is overruled. (T. 291).

Mr. Wrigley: Can we stipulate, Counsel, that my objection goes to this entire line of examination?

Mr. Moore: It will be so stipulated. (T. 292).

Thereafter counsel for defendants argued the motion to strike all testimony seeking to vary the terms of the written contract, and the Court, after hearing argument, denied the motion to strike.

6. The Court erred in accepting any testimony to vary the written contract of January 6, 1940, or the terms of the contract between United States Department of the Interior with defendant Union Paving Co. (Defendants' Exhibit T), as the contract of January 6 reduced all prior negotiations to a written form, from which the intent of the parties is to be ascertained. The contract of January 6, 1940 was unambiguous and certain, as were the terms of the contract between Union Paving Co. and the United States Department of the Interior, the terms and conditions of which plaintiff was bound by specific reference in the contract of January 6, 1940 and required plaintiff to place the reinforcement bars at a unit bid price, which price "shall include the cost of furnishing and attaching wire ties and metal supports if used, of unloading, hauling, sorting, storing, cutting, bending, clean-

ing, placing and securing and maintaining in position all reinforcement bars.” (Sec. 66 Contract between United States and Union Paving Co., Ex. T.)

7. The evidence does not support the Findings of the District Court in the following respects:

(a) That the contract was uncertain, ambiguous and indefinite as to who should pay for the cost of the falsework, scaffolding and interior framework. (Par. VIII Findings, p. 5).

(b) That during preliminary negotiations prior to entering into the contract, defendants agreed to pay the cost of the falsework, scaffolding and interior framework and that defendants eliminated such cost from their bid. (Par. VIII Findings, p. 5).

(c) The Conclusions of Law are contrary to the laws of the State of California and the decisions of this Court applicable to the evidence submitted.

8. There is no evidence or finding to support the conclusion that there was any attempt on the part of defendants to falsify any declaration, act or omission made or performed by defendants. No question of fraud or falsification entered into the case, nor is any alleged or charged. (Conclusions p. 13, par. II)

Appellants hereby designate as the parts of the record which they think are necessary for the consideration of such points the following:

1. All of the evidence and proceedings which the parties have stipulated and agreed, in a stipulation dated August 31, 1943, and filed with the above entitled court, shall be printed or reproduced in the printed record.

2. All the exhibits which the parties hereto have, in said stipulation, stipulated and agreed need not be included in the printed record, because of their nature or character it is impossible or impracticable to include the same therein, but which have been sent to the above entitled court by the District Court for its inspection and use on the appeal, and which the parties have stipulated and agreed in said stipulation may be so used.

Dated: September 27, 1943.

HENRY F. WRIGLEY

DION R. HOLM

Attorneys for Appellants

206 City Hall

San Francisco

Receipt of a copy of the foregoing Appellants' Concise Statement of Points on which they intend to rely on Appeal and Designation of Parts of Record Appellants think Necessary for the Consideration of such Points, is hereby acknowledged this 27th day of September, 1943.

THELEN & MARRIN

COURTNEY L. MOORE

Attorneys for Appellee

[Endorsed]: Filed Sept. 27, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF ADDITIONAL PARTS OF THE RECORD WHICH APPELLEE BELIEVES ARE MATERIAL

Pursuant to the provisions of Paragraph VI of Rule 19 of this Court, appellee above named hereby designates additional parts of the record which it believes are material to the consideration of the points urged by appellants.

By points 1 to 4, appellants urge that assuming that appellant breached the contract, that the sole remedy of appellee was to rescind the contract and cease performance, and that it failed to rescind, but on the contrary performed the contract in its entirety, and that because it failed to rescind the contract and performed it in its entirety, that appellee cannot recover; and under point 5, appellants urge that error was committed by the District Court in permitting oral evidence tending to vary the terms of the written contract dated January 6, 1940, between appellant, Union Paving Co., and Appellee, and has designated certain portions of the record and the ruling of the District Court in admitting said evidence as error.

In reply thereto, appellee states that all of the evidence and exhibits have probative value bearing upon the foregoing issues and therefore in compliance with the provisions of Paragraph VI, Rule 19, of this Court hereby designates the entire tran-

script on appeal together with all exhibits introduced in evidence as material to these issues.

Dated: October 1, 1943.

THELEN & MARRIN

COURTNEY L. MOORE

Attorneys for Appellee

[Endorsed]: Filed Oct. 4, 1943. Paul P.
O'Brien, Clerk.

No. 10,571

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNION PAVING Co. (a corporation), PACIFIC
INDEMNITY COMPANY (a corporation),
and MARYLAND CASUALTY COMPANY (a
corporation),

Appellants,

VS.

UNITED STATES OF AMERICA, for use and
benefit of Soulé Steel Company (a cor-
poration),

Appellee.

APPELLANTS' OPENING BRIEF.

DION R. HOLM,

206 City Hall, San Francisco,

HENRY F. WRIGLEY,

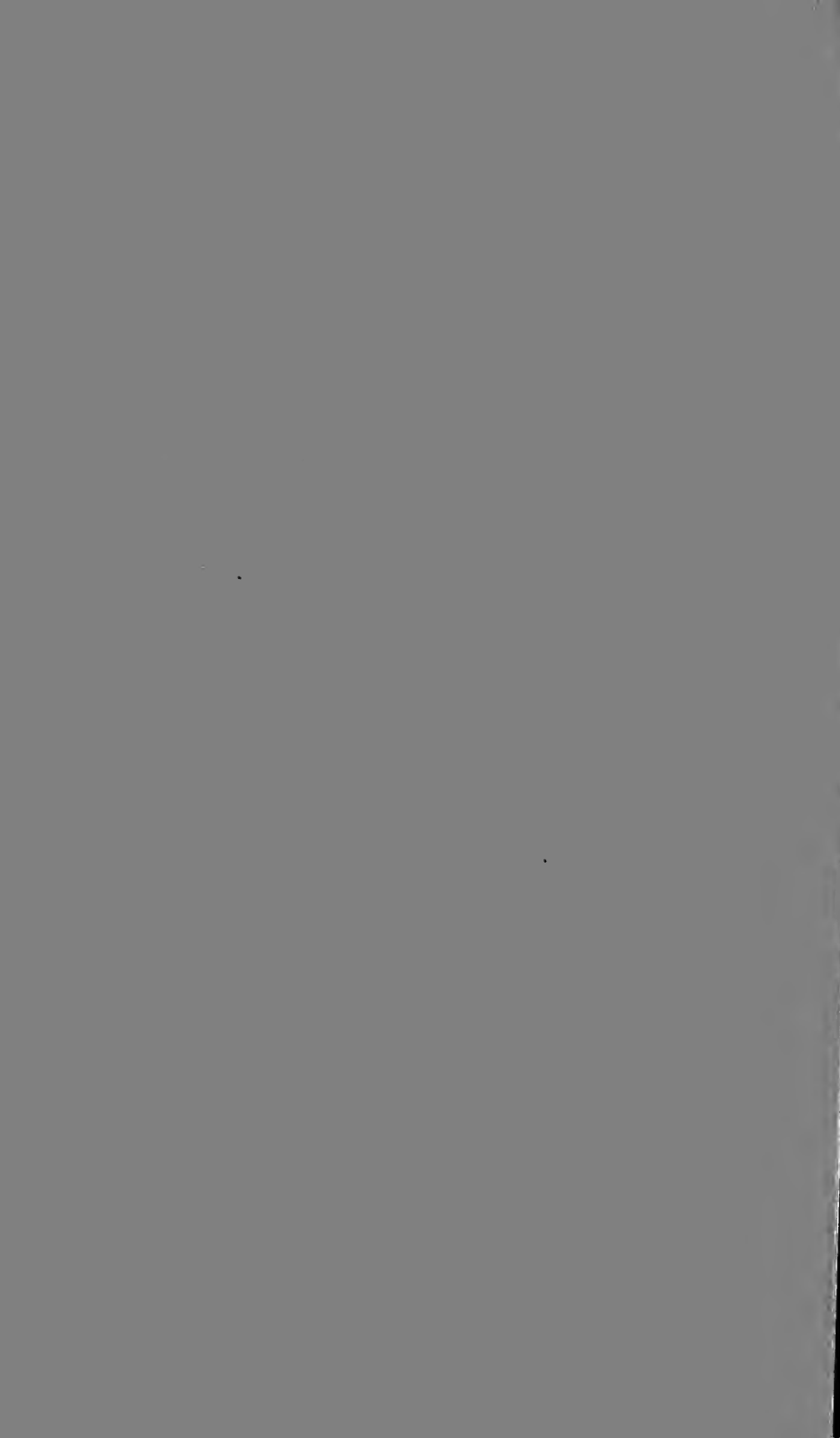
1029 Monadnock Building, San Francisco,

Attorneys for Appellants.

FILED

FEB 16 1944

PAUL P. O'BRIEN,
CLERK



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Point One.

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IN THE

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For the Ninth Circuit

UNION PAVING Co. (a corporation), PACIFIC
INDEMNITY COMPANY (a corporation),
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Appellants,

vs.

UNITED STATES OF AMERICA, for use and
benefit of Soulé Steel Company (a cor-
poration),

Appellee.

APPELLANTS' OPENING BRIEF.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment at law of the United States District Court for the Northern District of California in favor of the plaintiff, United States of America for use and benefit of Soulé Steel Com-

*For convenience, appellee Soulé Steel Company will be referred to herein as Soulé, subcontractor, Steel Company, or plaintiff, and appellants Union Paving Co., Pacific Indemnity Company, and Maryland Casualty Company will be referred to as Union Paving Co., Paving Co., or defendants.

All emphasis is supplied unless otherwise noted.

References to pages of the Transcript of Record are indicated thus: (1).

pany, and against the defendants, Union Paving Co., Pacific Indemnity Company, and Maryland Casualty Company, in the sum of \$69,642.48, plus costs of suit.*

The District Court for the Northern District of California has jurisdiction of the action under Section 24(1)(b) of the Judicial Code, as amended (28 U. S. C. A. 41(1)(b)) and Section 51 of the Judicial Code, as amended. (28 U. S. C. A. 113.)

The plaintiff is a California corporation (2) and the defendants, Union Paving Co. is a Nevada corporation (3), Pacific Indemnity Company, a California corporation (3), and Maryland Casualty Company is a Maryland corporation (3).

The amount in controversy, exclusive of interest and costs, exceeds the sum of \$3000.00. (8, 66.)

The pleadings necessary to show the jurisdiction of the District Court are the complaint (1 to 18), the answer and cross-claim (19 to 40), the answer to cross-claim (41 to 44) and amendment to the answer to cross-complaint. (45.)

The United States Circuit Court of Appeals for the Ninth Circuit has jurisdiction under Section 128(a) (d) of the Judicial Code, as amended. (28 U. S. C. A. 225 (a)(d).)

The judgment of the District Court was entered on May 10, 1943. (67.) On May 17, 1943 a motion for new trial was made (70) and on July 7, 1943 an order denying motion for new trial was made and entered (72) and on August 6, 1943 the defendants filed their notice of appeal (73); the transcript of record on

appeal was certified by the Clerk of the District Court on September 7, 1943 (74) and was filed in the office of the Clerk of this Court on September 27, 1943. (526.)

STATEMENT OF THE CASE.

The Department of Interior (Bureau of Reclamation) entered into a contract on November 4, 1939 with Union Paving Co. for the construction of four separate abutments and ten separate piers of various dimensions in connection with the relocation of the Southern Pacific Railroad and U. S. Highway 99 near Redding, Shasta County, California. This work was necessary as when the Shasta Dam, which is part of the Central Valley Project is completed, the reservoir formed back of it would flood the existing highway and railroad.

Union Paving Co. under the contract agreed, among other things, to construct abutments and piers extending across a canyon through which the Pit River flows. On top of these abutments and piers was to rest a double-decked bridge, one level of which would accommodate the Southern Pacific Railroad and the other for general traffic. The engineering and contract work required keen engineering skill. The contract price between the Department of the Interior and Union Paving Co. for the work described was \$1,138,888. The contract was bid on a unit price basis and made Union Co. subject to a penalty of \$100.00 per day for each day's delay that the work was not completed within the contract period. The abutments and piers

were designed and constructed to support a bridge 3587 feet long and two of the piers were in excess of 350 feet above the streambed, and 95 by 90 feet and 95 feet square, respectively, at the base. The materials out of which the piers were to be constructed were concrete and steel reinforcement bars.

The contract between the Department of Interior and Union Paving Co. was silent as to who would pay the cost of constructing falsework or scaffolding necessary, first to put the reinforcement steel bars in place and thereafter to be used to pour concrete.

On January 6, 1940 Union Paving Co. entered into a subcontract with Soulé Steel Company and under the terms of this contract Soulé agreed to furnish all labor, tools, accessories and equipment necessary to place the reinforcement bars and piers that were to support the bridge. The government furnished the reinforcement bars. The work to be performed by Soulé was to be done in accordance with the specifications covering the contract between Union Paving Co. and the Department of Interior.

Two of the paragraphs of the subcontract that require the interpretation of this Court, read as follows:

“The subcontractor at its own cost agrees to provide all labor, wire, wire ties, rods or other materials and appliances used for securing reinforcement bars, metal or other temporary supports, if used, to hold reinforcement bars during the placing of concrete, including backing-up strip required for welding, in accordance with

the provisions of paragraph 24 of said specifications." (14.)

The specifications referred to were those between Department of Interior and Union Paving Co.

And the second paragraph of the contract between Soulé and Union to be interpreted, reads as follows:

"The subcontractor at its own cost agrees to provide all labor, materials, tools, accessories and equipment and perform and observe all the provisions contained in paragraph 66 of said specifications.

"Time is of the essence of this agreement and the subcontractor agrees that it will proceed with the placing of reinforcement bars in sections of the piers and abutments made ready for such placement immediately after being notified by the contractor of the readiness of each section and prosecute the same diligently to completion, unless prevented by strikes, lockouts or other contingencies beyond its control.

"The subcontractor agrees that the contractor shall have the right to use its rigs and equipment upon the job for the purpose of lifting and hoisting materials, equipment and forms at all times, when the same is not in use by the subcontractor, free from any charge, except that said contractor agrees to assume all risk or loss to said equipment, from said contractor's use thereof, and shall save the subcontractor harmless from any damage, claim or loss arising from said use.

"The contractor at its own cost agrees to provide an accessible roadway from Highway 99 to the base of all piers and abutments; construct a

wooden trestle over and about the base of all pier excavations and construct wooden cores as shown on the plans which may be used by the subcontractor as a supplementary support for reinforcement bars; said subcontractor assuming the risk of any damage to said trestles or cores arising directly or indirectly from the use thereof and shall save and hold harmless said contractor from any damages, claims or losses.

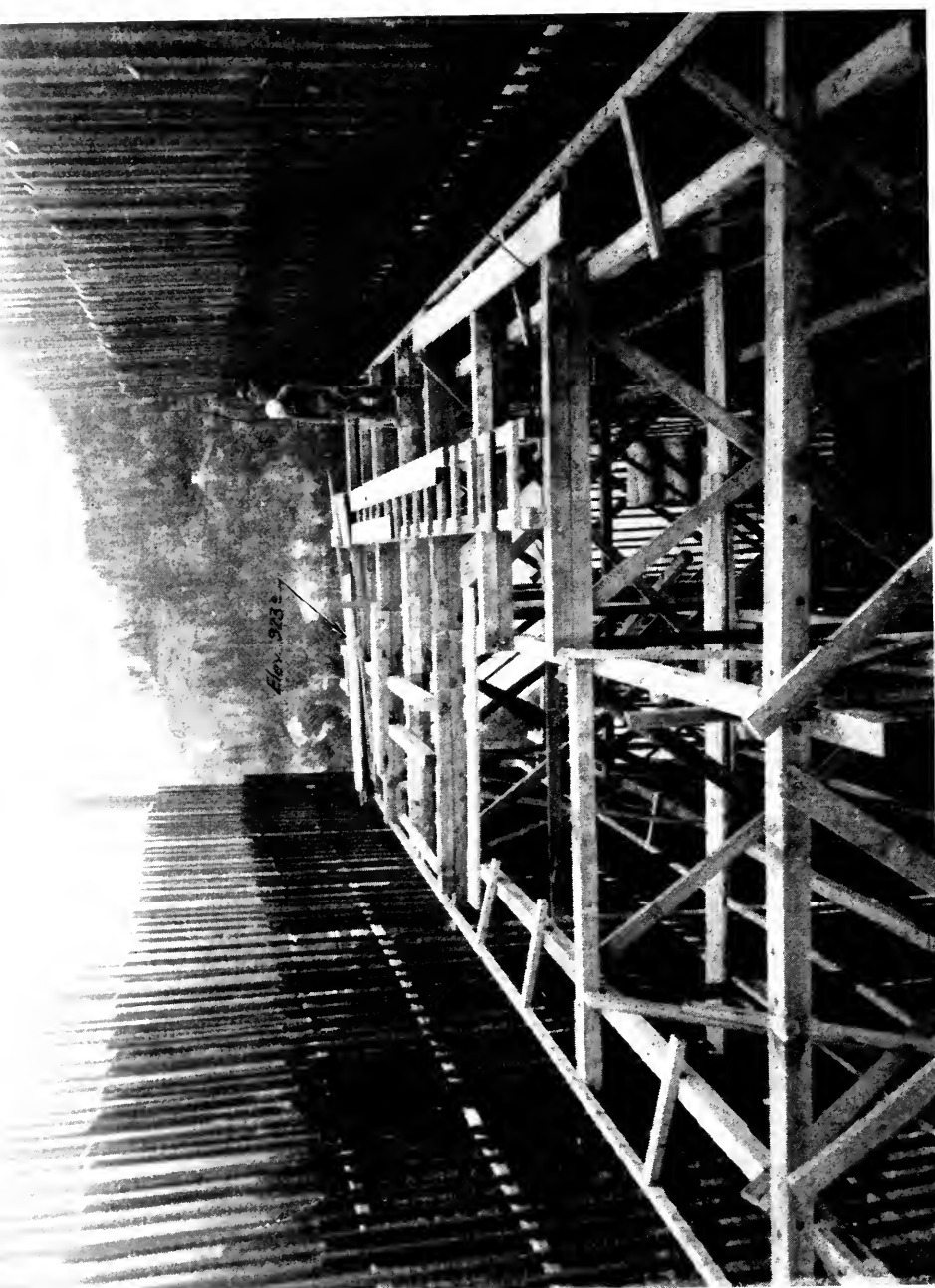
“The contractor at its own cost agrees to provide sufficient electric current at or near the base of each pier and install electric energy for the operation of the subcontractor’s equipment.

“The contractor at its own cost agrees to provide and pour necessary concrete sills in the base of all piers sufficient to support reinforcing steel mats.

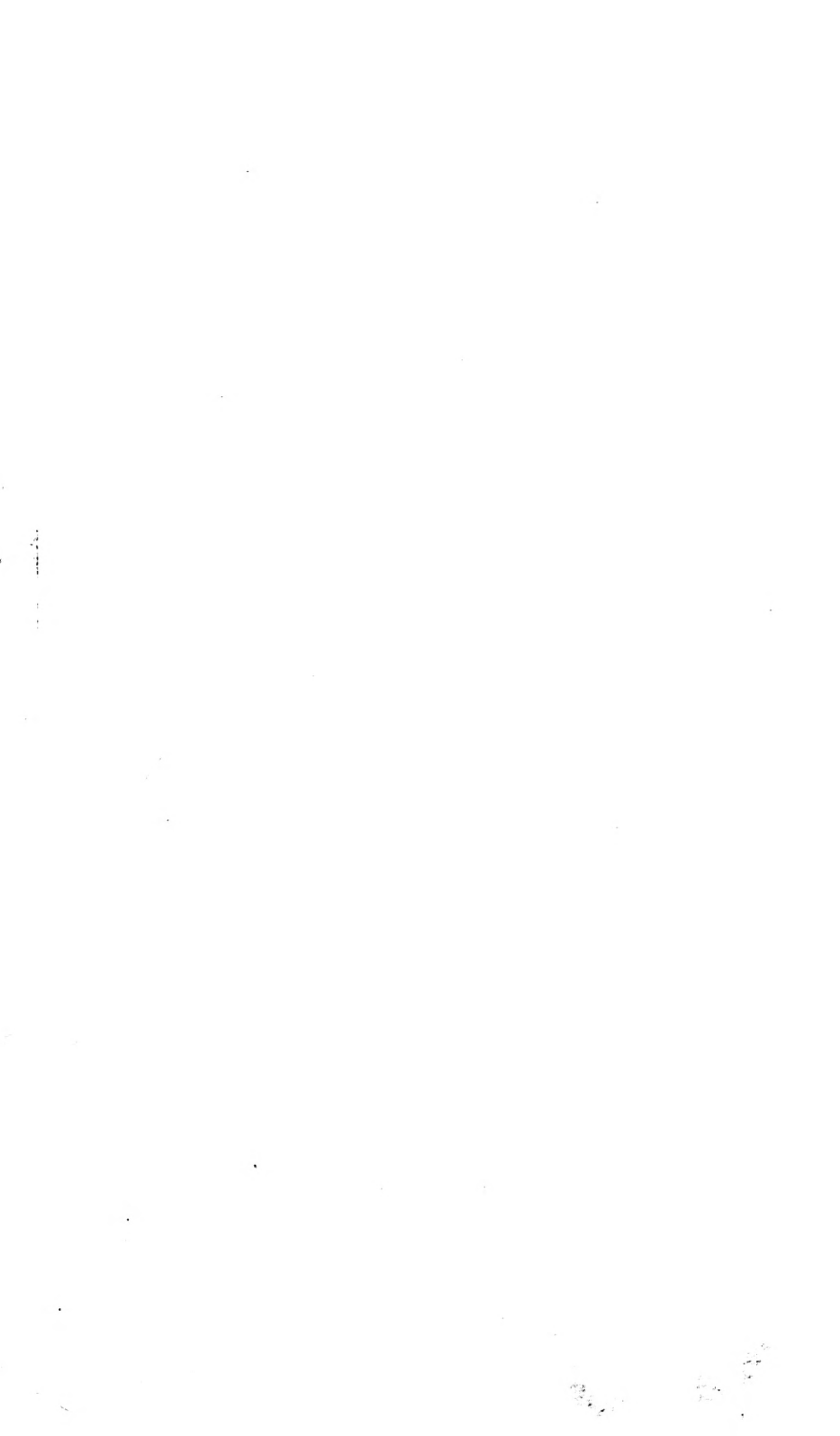
“The contractor agrees to pay said subcontractor for placing reinforcement bars at the rate of \$22.50 per ton for reinforcement bars actually placed in accordance with the plans and specifications which shall be considered as full compensation for unloading, warehousing, hauling, bending and placing reinforcement bars and clamps, and doing all work necessary or incidental thereto and for furnishing all tie wire, clamps and supporting devices.” (15 and 16.)

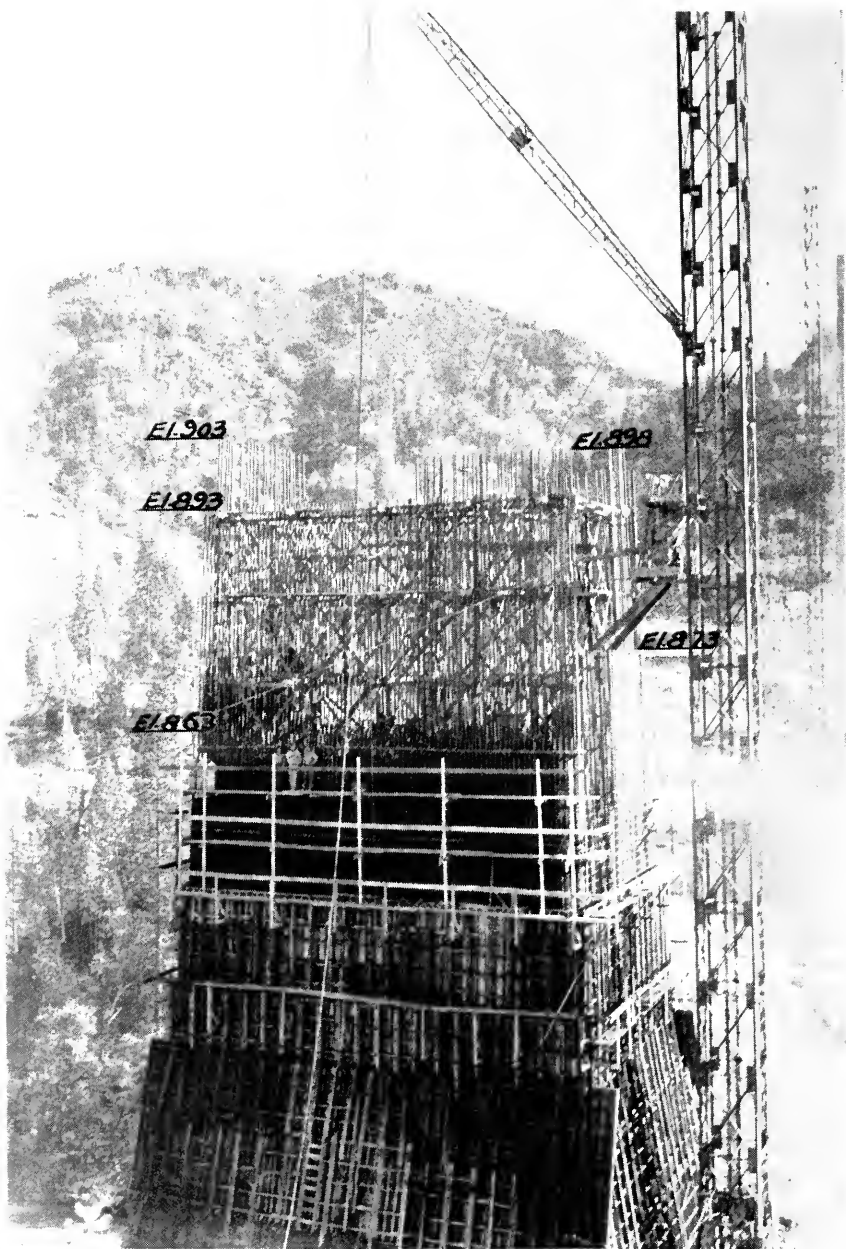
The price agreed upon between Soulé and Union was that the subcontractor would be paid \$22.50 per ton for reinforcement bars actually placed in accordance with the plans and specifications. Soulé did place 5533 tons of these reinforcement bars and Union Paving Co. paid Soulé the sum of \$63,612.29. (58, 59,





Elev. 323 ±





Defendants' Exhibit A

97.) The difference between the sum paid and \$124,495 which was the cost of placing 5533 tons of reinforcement bars (89) represented approximately one-half of the cost to Union Paving Co. for the erection of falsework and scaffolding primarily required to place the steel bars and secondarily used by Union Paving to pour concrete. The total cost of constructing the falsework was \$117,916. (286, 287.) Of this sum Union Paving Co. charged itself with the amount of \$56,803 and charged to Soulé \$61,112. (287.)

No charges were made against Soulé for falsework or temporary supports on abutments 2, 3 and 4 or piers 8, 9 and 10. (286, 287, 302.)

These abutments and piers were smaller units and the reinforcement bars were placed in position and rested on rock base or concrete curbs or sills and were self-supporting. They required no welding or falsework to support them.

This case concerns the reinforcement bars placed in abutment 1 and piers 1, 2, 3, 4, 5, 6 and 7. The reinforcement bars used in these piers are about 2" square and in 60-foot lengths and weighing approximately 900 pounds, required welding and falsework or interior framework to support them as they were placed in a variable oblique or sloping position.

J. A. Dowling, manager of Union Co., testified that in July, 1940 at the job site he discussed with L. E. Stevens, a partner with Soulé Company (335) that some agreement should be reached of how the charges for the interior structures should be apportioned and

Mr. Stevens replied he would take it up with San Francisco (meaning the office of Soulé Company) and nothing happened until September, 1940 when a similar conversation occurred with Mr. Stevens, with similar results. About these conversations there is a conflict.

On October 25, 1940, Soulé, with its employees (436, 437), undertook to and actually constructed the falsework and interior framework.

Edward L. Soulé, president of Soulé Steel Company, was aware that Union had stopped making payments in July, 1940 (336) but knew as early as October 15, 1940 (336, 339) that the proration of the cost of the falsework was to be made.

On October 15, 1940 there remained to be done under the Soulé contract more than 50 per cent of the work contemplated and provided for under the contract.

The estimate of steel placed as of September 30, 1940 was 2000 tons, as appears from Plaintiff's Exhibit No. 7. (85.)

The subcontract of Soulé was completed May 30, 1941. (96.)

After October 15, 1940 Soulé accepted a payment on January 18, 1941 from Union Paving Co. of \$20,000 (95) and another payment on December 31, 1941 of \$16,000. (59.) In other words, Soulé accepted \$36,000 in two payments after October 15, 1940, when it knew the charges for the falsework or scaffolding

was to be made against it and at a time when more than 50 per cent of the work under the contract remained to be performed.

Soulé Company did not give notice of rescission or endeavor to rescind the contract with Union Co. or notify Union that it refused to pay its proportion of the cost of the construction of the falsework and scaffolding or interior framework until after the completion of the contract. No notice was served on Union that Soulé would refuse to pay these costs.

Fraud or deceit is not alleged or intimated in this suit. This contract was drawn between two men of equal business experience, Edward L. Soulé representing the Steel Company, and J. A. Dowling the Paving Co.

PLEADINGS AND PROCEEDINGS HEREIN.

The complaint was filed on September 17, 1942. The complaint is based on one count, alleges the contract between Union Paving Co. and United States of America and the subcontract between Union Paving Co. and Soulé Steel Company. It sets out that the Paving Co. agreed to pay the Steel Company \$124,393 for the furnishing and supplying of labor and materials, tools and equipment under the contract for which the Paving Co. agreed to pay the sum last stated, plus certain additions to the contract, and after alleging that the Paving Co. had paid \$63,712 it prayed for \$61,352 with interest as remaining unpaid by the Union Paving Co.

The insurance companies named defendants had supplied a payment bond as sureties to the United States insuring payment to all persons supplying labor and material in the contract between Union Paving and the United States.

Attached to the complaint as Exhibit "B" is the "Memo of Agreement" between Union Paving Co. and Soulé Steel Company. The answer and cross-claim of defendants was filed October 17, 1942, in which it is denied there was any amount of money due Soulé from Union, and by way of cross-claim pleaded the contract between the United States and Union Paving Co. and the subcontract between Union Paving Co. and Soulé Steel Company, alleging that the latter failed and refused to do all work necessary and incident to the placing of said reinforcing bars by not providing necessary temporary supports and supporting devices to place the bars, which Union did at the reasonable cost of \$58,835.

Other items of expenditures made by Union for Soulé were pleaded, setting out that all indebtedness of Soulé to Union was \$61,112.

An answer to the cross-claim was filed November 21, 1942 denying the allegations of the cross-claim setting out it was the duty of Union to erect the falsework and scaffolding, and denying it was indebted under the contract in the sum set forth in the cross-claim. Thereafter, on November 25, 1942, an amendment to the answer to "cross-complaint" was filed, denying certain additional allegations of the cross-claim.

After trial by the Court, findings of fact and conclusions of law, to which reference will hereafter be made in this brief, were made and filed, and on May 10, 1943, judgment was entered for plaintiff as prayed for in the complaint and denied judgment on the cross-complaint of defendant. In the judgment plaintiff recovered the sum of \$69,643 plus \$299 costs. On May 17, 1943, a motion for new trial was made in behalf of defendants and on July 7, 1943 an order was made denying the motion for new trial.

QUESTIONS INVOLVED.

The questions involved in this appeal are:

1. Does the subcontract between Union Paving Co. and Soulé Steel Company provide that Soulé was to pay for the cost of constructing the falsework and interior framework to support the reinforcement bars?
2. Was it not the duty of Soulé Steel Company when it was admittedly aware on October 15, 1940, when more than half of the contract remained to be completed, that the cost of the falsework and interior framework was to be charged against it, to have given notice of rescission of the contract and rescinded the same?
3. Did not the Court err in admitting testimony of oral negotiations leading up to the entering into the written contract that altered the terms of the written instrument?

SPECIFICATION OF ERRORS.

Defendants specify the following errors upon which they will rely in the prosecution of this appeal from the judgment of the District Court in this cause made and entered on May 10, 1943. Defendants specify that the District Court erred in each of the following particulars:

1. The District Court erred in granting judgment to plaintiff for a proportionate cost of the construction of falsework and interior framework that was essential for the uses of plaintiff in placing the reinforcement steel bars and where plaintiff undertook and actually did the construction of the falsework during one day of the contract and the contract provided that the plaintiff

“at its own cost agrees to provide all labor, wire, wire ties, rods or other materials and appliances used for securing reinforcement bars, metal or other temporary supports, if used, to hold reinforcement bars during the placing of concrete, including backing-up strip required for welding”,

and where the contract further provided that plaintiff

“at its own cost agrees to provide all labor, materials, tools, accessories and equipment and perform and observe all the provisions contained in paragraph 66 of said specifications”,

(referring to specifications between the Department of Interior and Union Paving Co.) all of which was essential for the use of plaintiff in placing the reinforcement steel bars.

2. The District Court erred in finding:

“IX.

“The Court finds that it was the mutual intention of the parties as it existed at the time of the making of the contract of January 6, 1940, that said defendant, Union Paving Co., should erect and pay the cost of the erection of the falsework, scaffolding and interior framework of Abutment No. 1 and Piers 1, 2, 3, 4, 5, 6, and 7, and that the plaintiff should not erect or pay any of the cost of the erection of said falsework, scaffolding and interior framework, but that plaintiff should have the right without cost to use said falsework, scaffolding and interior framework for the purpose of supporting, placing and securing in position the reinforcing bars.” (56; Finding IX.)

The foregoing finding is unsupported by the evidence, as the contract between plaintiff and defendant Union Co. contemplated and provided that Soulé Company should pay the cost of the erection of the falsework, scaffolding and interior framework, all necessary for the placing of the reinforcement steel bars.

3. The District Court erred in holding that plaintiff recover damages for the alleged breach of the written contract between plaintiff and defendant Union Co. based on an alleged breach, when more than 50 per cent of the work to be done under the contract had not been performed and plaintiff failed to give notice of rescission and failed to rescind the contract.

4. The District Court erred in giving judgment to plaintiff when plaintiff admitted it was notified in October of 1940, when less than 50 per cent of the contract was completed, that plaintiff was to pay the cost of constructing the falsework or interior framework supporting the steel bars placed by plaintiff, and then continued with the contract, accepting all benefits thereunder, including the acceptance of \$36,000 in two payments made, respectively, on January 18, 1941 in the amount of \$20,000 and on December 31, 1941 in the amount of \$16,000.

5. The District Court erred in giving judgment for plaintiff when the evidence disclosed that plaintiff had completed its contract on May 30, 1941 (96) and thereafter accepted a payment on December 31, 1941 in the amount of \$16,000 from defendant due under the contract, after plaintiff was aware defendant expected and demanded plaintiff to pay for the cost of the falsework or interior framework, which payment was withheld by defendant until the cost of the construction of the falsework or interior framework had been offset.

6. The following errors were committed by the District Court in admitting oral evidence tending to vary the terms of the written contract dated January 6, 1940, between plaintiff and defendants.

(a) Testimony by witness Ross L. Mahon (225 to 231), in which he stated conversations held during October, 1939 between J. A. Dowling, the then manager of Union Paving Co., and Edward L. Soulé,

president of plaintiff company, one conversation being in Dowling's room at the Senator Hotel at Sacramento at 10 or 11 o'clock in the evening (229) while Dowling was in bed, the substance of the latter conversation being, Soulé quoted a price of \$33.80 a ton for the reinforcement steel to be installed, which included the cost of supporting structure for the steel. Objection to this testimony was made by Mr. Wrigley, then counsel for defendants, as follows:

Mr. Wrigley. I want to object to this as irrelevant, incompetent and immaterial. The parties in this case entered into a formal written contract as of January 6, 1940 that superseded all prior negotiations, discussions, offers and everything else, and anything they may have agreed prior to that date was carried into that contract and cannot be admissible under the California Civil Code, Section 1625. (226.)

The Court. I will allow it subject to a motion to strike. (227.) * * *

Mr. Wrigley. May it please the Court, to save time, may it be understood that my objection goes to the entire line of examination without repeating it continuously?

Mr. Moore. It is so stipulated. (227.) * * *

Mr. Wrigley. At this time I want to move to strike out the entire testimony of this witness on the ground that it is an attempt to vary the terms of a written contract which the parties formally entered into at a later date. Section 1625 of our Civil Code of Cali-

fornia provides that the execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning matters which preceded or accompanied the execution of the instrument. (230, 231.)

The Court. I will allow it to go in so we can have a record on the ground of the witness not being available, and it is all going in subject to your motion to strike and your objection, and I will give both sides an opportunity to examine into the matter fully. (230.)

(b) During the cross-examination of J. A. Dowling he was asked by counsel for plaintiff as to a conversation held on December 29, 1939, in plaintiff's office as to how framework or falsework should be built and who should pay for it. (305.) The following occurred:

Mr. Wrigley. I object to that as incompetent, irrelevant, and immaterial, and an attempt to go back over a written contract, which is prevented by Section 1625 or our Code. The parties agreed to a writing, in which the obligations of each party were stated. An attempt to reopen that in order to vary the contract I say is objectionable. * * * (306.)

The Court. Pardon me. What was the date of the meeting? (308.)

Mr. Moore. December 9, 1939. (Meaning December 29, 1939.) * * * (308.)

The Court. The objection may be overruled. You may answer. (320.)

After the overruling of the objection, testimony was received as to details of drawings, one of which, the witness testified was not the drawing submitted in Court which was supposed to show the falsework and which plaintiff claimed defendants agreed to pay for and erect, various bids made by plaintiff, letters concerning the basis of bid, all antedating January 6, 1940, the date of the contract, and the following occurred:

Mr. Wrigley. Just a second, Mr. Dowling. So the record will be clear, will it be stipulated, in the interest of time, that I object to this entire line of examination, that it all goes in subject to my objection and my motion to strike? (322, 323.)

Mr. Moore. It will be stipulated. * * * (323.)

A letter dated December 11, 1939, Plaintiff's Exhibit 21, that purported to contain the terms of the contract, was offered in evidence.

Mr. Moore. I will introduce this in evidence, your Honor.

Mr. Wrigley. Same objection. (323.)

The Court. Let it be admitted and marked. (324.)

(c) Through witness Edward L. Soulé (371 to 378) testimony was elicited, over defendants' objection, as to conferences showing estimates and bids made by plaintiff prior to the execution of the contract, drawings made by plaintiff's representative, details as to the type of supporting devices, or falsework to be constructed, how the estimate was scaled down from \$30.00 a ton for the placing of the re-

inforcement bars to \$28.60, then further reduced by \$3.77 a ton (377) representing the cost of the supporting devices, and a sum arrived at \$24.80 as plaintiff's bid. Discussions as to type of falsework (380), welding of the bars, and statements alleged to have been made by a representative of defendant company that (382, 383) defendants would assume the cost of the falsework.

All the foregoing testimony was admitted over defendants' objection, and how finally the bid price was lowered to \$22.75 and ultimately to \$22.50 a ton. (384.)

Mr. Moore. We also offer a copy of letter of December 11th produced by Mr. Soulé and identified by him.

Mr. Wrigley. The same objection.

The Court. Same ruling.

(The document was received in evidence and marked "Plaintiff's Exhibit 23.") (388.)

(d) During testimony of Lester Earl Stevens (463) plaintiff sought, and the witness testified as to estimate made, prior to the execution of the contract, for placing the reinforcement steel bars and the cost of the falsework to support them, and during which testimony the witness stated his estimates were first with the cost of the falsework and revised thereafter to exclude this cost.

This testimony was objected to, as follows:

Mr. Wrigley. I want to object to this as incompetent, irrelevant, and immaterial, attempting to vary the terms of a written contract.

The Court. The objection is overruled. * * * (463.)

Mr. Wrigley. Same objection to this entire line of examination. (463.)

The Court. Read the question, Mr. Reporter.
(Question and answer read.)

The Court. The objection is overruled. (464.)

Mr. Wrigley. Will you stipulate, Counsel——

Mr. Moore. I will stipulate.

Mr. Wrigley (continuing). ——that my objection runs to this entire line of examination, and I will in due course make a motion to strike out?

Mr. Moore. So stipulated. (464.)

(e) Testimony was offered by plaintiff through Alexander Cochrane (476) as to conversations had in December, 1939 regarding the preparation of a draft of a plan showing the falsework and reinforcement bars, the various sums suggested as the bid price of the work to be undertaken by plaintiff and that defendants agreed to pay for and construct the falsework. This line of testimony was objected to by counsel for defendants.

Mr. Wrigley. I object to this as incompetent, irrelevant, and immaterial, and an attempt to vary the terms of a written contract in violation of Section 1625 of the Civil Code. (476.)

The Court. The objection is overruled. (477.)

Mr. Wrigley. Can we stipulate, Counsel, that my objection goes to this entire line of examination?

Mr. Moore. It will be so stipulated. (478.)

Thereafter counsel for defendants argued the motion to strike all testimony seeking to vary the terms

of the written contract, and the Court, after hearing argument, denied the motion to strike.

On April 19, 1943, the District Judge made the following order denying motion to strike certain testimony (47):

The parties hereto being present as heretofore, the further trial of this case was this day resumed. Mr. Wrigley made a motion to strike certain testimony, and after argument by Mr. Wrigley and Mr. Moore, it is ordered that said motion to strike certain testimony be denied. The evidence being closed, and the case, after argument by the attorneys, being submitted and fully considered, it is ordered that judgment be entered in favor of plaintiff on findings of fact and conclusions of law, and that the defendant take nothing on the cross-claim. (36.)

7. The Court erred in accepting any testimony to vary the written contract of January 6, 1940, or the terms of the contract between United States Department of the Interior (Bureau of Reclamation) with defendant Union Paving Co. (Defendants' Exhibit T), as the contract of January 6 reduced all prior negotiations to a written form, from which the intent of the parties is to be ascertained. The contract of January 6, 1940 was unambiguous and certain, as were the terms of the contract between Union Paving Co. and the United States Department of the Interior, the terms and conditions of which plaintiff was bound by specific reference in the contract of January 6, 1940 and required plaintiff to place the reinforcement bars at a unit bid price, which

price "shall include the cost of furnishing and attaching wire ties and metal supports if used, of unloading, hauling, sorting, storing, cutting, bending, cleaning, placing and securing and maintaining in position all reinforcement bars." (Sec. 66 Contract between United States and Union Paving Co., Ex. T.)

8. The evidence does not support the findings of the District Court in the following respects:

(a) That the contract was uncertain, ambiguous and indefinite as to who should pay for the cost of the falsework, scaffolding and interior framework. (Finding VIII, 51, 52.)

(b) That during preliminary negotiations prior to entering into the contract, defendants agreed to pay the cost of the falsework, scaffolding and interior framework and that defendants eliminated such cost from their bid. (Finding VIII, 51, 52.)

(c) The conclusions of law are contrary to the laws of the State of California and the decisions of this Court applicable to the evidence submitted.

9. There is no evidence or finding to support the conclusion that there was any attempt on the part of defendants to falsify any declaration, act or omission made or performed by defendants. No question of fraud or falsification entered into the case, nor is any alleged or charged. (Conclusion II, 62, 63.)

10. The District Court committed an error of law in denying the motion for new trial which included the grounds, among others, that plaintiff had failed to give notice of rescission or rescinded its contract.

(71.) This, in view of the undisputed testimony that plaintiff proceeded with the work provided for under the contract after it was aware that it was called upon by defendants to perform this work, when more than 50 per cent of the contract remained to be completed and that the plaintiff thereafter accepted benefits in the form of payments after being aware of what it was expected to do under the contract.

ARGUMENT.

POINT ONE.

THE SUBCONTRACT BETWEEN UNION PAVING AND SOULE STEEL EXPRESSLY PROVIDES THAT SOULE FURNISH ALL TEMPORARY SUPPORTS TO HOLD REINFORCEMENT BARS DURING THE PLACING OF CONCRETE AND THAT AT ITS OWN COST AGREES TO PROVIDE ALL LABOR, MATERIALS, TOOLS, ACCESSORIES AND EQUIPMENT AND PERFORM AND OBSERVE ALL THE PROVISIONS CONTAINED IN PARAGRAPH 66 OF THE CONTRACT BETWEEN THE DEPARTMENT OF INTERIOR AND UNION PAVING CO.

The specifications for the contract between the Department of the Interior and Union Paving Co. (Exhibit T, at p. 35, Sec. 66), after stating that the reinforcement bars will be furnished by the Government, and other matters relating to the removal of all rust from the bars, (Section 66) provides:

“Reinforcement bars shall be accurately placed and secured in position so that they will not be displaced during the placing of the concrete, and special care shall be exercised to prevent any disturbance of the reinforcement bars in concrete that has already been placed. Metal chairs, metal hangers, metal spacers, and other metal supports

satisfactory to the contracting officer may be furnished and used by the contractor for supporting reinforcement bars. Wherever necessary, in the opinion of the contracting officer, to prevent future damage to the concrete or unsightly rust stains on exposed concrete surfaces, all such supports for reinforcement bars shall be made of noncorrodible metal. Payment for placing reinforcement bars will be made at the unit price per pound bid therefor in the schedule, which unit price shall include the cost of furnishing and attaching wire ties and metal supports if used, of unloading, hauling, sorting, storing, cutting, bending, cleaning, placing, and securing and maintaining in position all reinforcement bars, as shown on the drawings or as directed by the contracting officer.” (35.)

The first lines of the last quoted language are called to the Court’s attention:

“Reinforcement bars shall be accurately placed and secured in position so that they will not be displaced during the placing of the concrete,”

and the concluding sentence of the section concerning the payment for placing the bars will be made at a unit price per pound which price shall include

“the cost of furnishing and attaching wire ties and metal supports if used, of unloading, hauling, sorting, storing, cutting, bending, cleaning, placing, and securing and maintaining in position all reinforcement bars.”

The pertinent provisions of the subcontract between Union Co. and Soulé Steel provides:

“The subcontractor at its own cost agrees to provide all labor, materials, tools, accessories and equipment and perform and observe all the provisions contained in paragraph 66 of said specifications.” (15.)

The word “specifications” refers to the specifications between the Department of the Interior (Bureau of Reclamation) and the Union Paving Co.

Other provisions of the subcontract that we believe provide that Soulé was to have built the falsework and interior framework, are the following:

“24—Materials to be furnished by the subcontractor:

The subcontractor at its own cost agrees to provide all labor, wire, wire ties, rods or other materials and appliances used for securing reinforcement bars, metal or other temporary supports, if used, to hold reinforcement bars during the placing of concrete, including backing-up strip required for welding, in accordance with the provisions of paragraph 24 of said specifications.” (Again the word “specifications” referred to the specifications between Union and the Government.)

“45—Welding reinforcing bars:

The subcontractor at its own cost agrees to provide all labor, materials and equipment and cut the ends of the bars for welding and provide all clamps, tie rods, cables, blocking, anchors, and other accessories that may be required, including the placement of backing-up strips and shall firmly and securely hold the reinforcing bars in position in accordance with the provisions of

paragraph 45 of said specifications, excepting therefrom only the labor, materials and equipment necessary for the welding of the joints for which work other contractors will be employed.” (14, 15.)

The language we wish to emphasize under paragraph numbered 24 of the subcontract is that the subcontractor is to furnish

“all labor, wire, wire ties, rods *or other materials and appliances used for securing reinforcement bars, metal or other temporary supports,* if used, *to hold reinforcement bars during the placing of concrete, including backing-up strip required for welding,*”

And again we desire to call the Court’s attention to the work required of the subcontractor in preparation of the welding of the reinforcement bars, in which, under the paragraph numbered 45, it agrees to furnish at its own cost all labor, materials and equipment,

“all clamps, tie rods, cables, blocking, anchors, and other accessories that may be required, including the placement of backing-up strips and shall firmly and securely hold the reinforcing bars in position while the joints are being welded in accordance with the provisions of paragraph 45 of said specifications, * * *” (14, 15.)

At this point it might be well to give a brief explanation of what the operation of placing reinforcement bars entailed. This required above the foundation of

the piers, placing at variable oblique or sloping position upward as well as horizontally, the steel bars around which was to be poured the concrete.

The vertical bars which were of a size of approximately two inches square and in lengths of approximately 60 feet and weighing from 800 to 900 pounds (429, 430), obviously could not remain upright without supports; hence the necessity for the falsework or interior framework to keep these bars in an upright and firm position until they were prepared for welding to the next length to be attached to those placed in position and finally to have concrete poured about them.

That the construction of the falsework and interior framework by the Soulé Steel Company was contemplated by the subcontract is shown by exceptions made where this was not intended and Union Paving Co. assumed the burden. There were cores on Piers 3 and 4 (170) that primarily were concrete construction and falsework or interior framework had to be built to pour the concrete around these cores.

In the contract it is provided:

“The contractor at its own cost agrees to provide an accessible roadway from Highway 99 to the base of all piers and abutments; construct a wooden trestle over and about the base of all pier excavations *and construct wooden cores as shown on the plans which may be used by the subcontractor as a supplementary support for reinforcement bars*; said subcontractor assuming the risk of any damage to said trestles or cores arising directly or indirectly from the use thereof and

shall save and hold harmless said contractor from any damages, claims or losses." (16.)

If it were not intended under the subcontract that the Soulé Company was not to build the falsework and interior framework, there was no reason to state that where there were cores in the piers that Union Co. would undertake to build those, and which structures could then be used by Soulé to support the reinforcement bars. If Union Co. were supposed to build all the falsework and interior framework, what would have been the purpose of incorporating the section of the contract last quoted?

When Union through J. A. Dowling, its manager, was unable up to October 15, 1940, to reach an agreement with Mr. Stevens, the partner and representative of the Soulé Company, at the place of construction, as to the proportion of cost for falsework, Union then set up its books in a more than equitable fashion, charging the cost of all the falsework and interior framework which it had constructed and paid for on the equitable basis of \$56,803 to Union Paving Co. and \$61,112 to Soulé Steel Company. (Exhibit Y, 286, 287.) No charges were allocated against Soulé for Abutments 2 and 4, or Piers 8, 9 and 10.

We feel the subcontract, for the reasons stated, and the reading of the contract itself clearly illustrates that Soulé Steel Company obligated itself to construct all falsework and interior framework other than in the piers where cores were provided for and where Union Paving Co. charged itself when Soulé was not primarily to use the falsework or interior framework.

POINT TWO.

CERTAIN CHARGES FOR TEMPLATES, SPACERS AND LUMBER WERE ADMITTED AS CHARGEABLE BY SOULÉ AGAINST IT, BUT FOR WHICH THE COURT ALLOWED NO CREDIT.

Loren Hunt (157, 158, 167) testified that no charges were made against Soulé for any of the exterior framework that was used primarily by Union Co. The interior falsework or framework that was used, in the first instance by Soulé was charged against the Steel Company. The witness testified separate accounts were kept as to the materials used and the cost of labor. The result of these figures is reflected in Exhibit Y. (286, 287.)

L. E. Stevens, the partner of Soulé testified (423) the spacers used in the interior falsework were used principally to support the steel work, and "stiffeners" also used on this interior framework had no use in pouring concrete. This also applied to templates. (423.) And other than in some instances this work was done and paid for by Union Co. This, of course, would include all lumber, bolts, nails and other materials. The District Court, however, in its judgment failed to in any way credit Union with any of the costs of the items in this subdivision of the brief referred to, and it follows that the judgment of the District Court is therefore obviously inaccurate, at least to the extent of the cost of the items specified.

POINT THREE.

ON OCTOBER 15, 1940 SOULE ADMITS KNOWING FALSEWORK AND INTERIOR FRAMEWORK WAS TO BE CHARGED TO IT, WHEN THE CONTRACT WAS LESS THAN 50 PER CENT COMPLETED, AND FAILED TO GIVE NOTICE OF RESCISSION OR RESCIND THE CONTRACT. THE FAILURE TO RESCIND PRECLUDES SOULE FROM RECOVERING.

The facts to be noted in considering this point of our brief are that the Soulé Company admits by October 15, 1940, it knew Union Co. was charging against Soulé a portion of the cost of the falsework and interior framework. Mr. Dowling, manager of Union Co., testified he advised Mr. Stevens at the job site as early as July, 1940 that Soulé was expected to pay its proportion of the falsework and interior framework. This is disputed. But it is a fact that on October 15, 1940 there remained more than 50 per cent of the contract to be completed, and further it is a fact that Soulé continued to complete the work under the contract until May 31, 1941 (6) which was the date of completion.

In other words, Soulé continued, taking the most advantageous date in behalf of Soulé as October 15, 1940, for 7½ months thereafter and, after being aware it was to stand its share of the cost of the falsework and interior framework, continued work under the contract until completed.

Another fact to be borne in mind is that Soulé accepted payments from Union Co. under the contract after October 15, 1940, namely, on January 18, 1941 in the sum of \$20,000 (95), and on December 31, 1941 of \$16,000 (59).

The complaint in this action is based on the contract (6) and seeks to recover damages because of the alleged breach of the contract. It is our contention that the law of California is quite clear on this subject.

There were two remedies, and only two remedies, that Soulé could pursue, assuming that October 15, 1940 was the first date it was notified that the Soulé Company was expected to pay a portion of the costs of the falsework and interior framework. These two remedies were: (1) That it might have treated the contract as rescinded and ceased work thereunder and sued for the value of labor and materials furnished to the date of the alleged breach justifying the rescission, or (2) It might have proceeded with the contract and advised the Union Co. it intended to complete the contract, reserving its right to claim damages on the completion of the contract.

Of course, before either of these steps were necessary for Soulé to select from, a few lines in the contract could have readily been supplied by Edward L. Soulé, a man of wide experience in the steel construction business and as familiar with contracts as was J. A. Dowling, the manager of the Union Co., to the simple effect that Union Co. was to pay the cost of all falsework and interior framework.

As illustrative of the soundness of our position, we respectfully call the attention of this Court to the law of California, which is controlling in this case:

Erie Railroad Co. v. Tompkins, 304 U. S. 64.

Under Section 1688 of the Civil Code of California a contract is extinguished by its rescission, and under Section 1691 of the Civil Code:

“Rescission, when not effected by consent, can be accomplished *only* by the use on the part of the party rescinding, of reasonable diligence to comply with the following rules:

“(1) He must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence or disability, and is aware of his right to rescind;

* * *”

Civil Code, Section 1691.

This section has been applied uniformly and strictly by the Supreme Court of California in decisions which are, of course, binding upon this Court.

Cox v. McLaughlin, 54 Cal. 605;

Cox v. McLaughlin, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164;

Bailey v. Fox, 78 Cal. 389, 20 Pac. 868;

Wills v. Porter, 132 Cal. 516, 64 Pac. 896;

California Co. v. Schiappa-Pietra, 151 Cal. 732, 91 Pac. 593;

Brown v. Domestic Utilities Manufacturing Co., 172 Cal. 733, 159 Pac. 163;

Schneider v. Henley, 61 Cal. App. 758, 215 Pac. 1036 (per St. Sure, J.).

There are three recent cases dealing with rescission of contracts that have been decided by this Court in which the reasoning contained therein is applicable to the case at bar.

The first case we refer to is

Six Companies of California v. Joint Highway District, 110 F. (2d) 620.

This case held that the rescission attempted under the facts of that case was not warranted.

The second case,

Wenzel & Henoch Const. Co. v. Metropolitan Water District of Southern California, 115 F. (2d) 25 (1940),

concerned itself about work to be done in the way of excavation in the construction of the San Jacinto Tunnel as part of the Colorado River Aqueduct Project. The district in that case gave notice of suspension of the contract and ejected the construction company from the works.

In passing on the question of necessity for rescission of such a contract on the part of the plaintiff before the plaintiff could be successful, this Court holds at page 32:

“Although under the California rule in building contracts the failure to pay an installment when due is not such a breach as will support an action on the contract for full performance, it will support a rescission of the contract and recovery in quantum meruit. *Cox v. McLaughlin*, 54 Cal. 605, 608, 609, 610; *Cox v. McLaughlin*, 76 Cal. 60, 62, 63, 18 P. 100, 9 Am. St. Rep. 164; *Porter v. Arrowhead Reservoir Co.*, 100 Cal. 500, 502, 503, 35 P. 146; *San Francisco Bridge Co. v. Dumbarton Land & Improvement Co.*, 119 Cal. 272, 274, 51 P. 335; see *Fairchild-Gilmore-Wilton Co. v. Southern Ref. Co.*, 158 Cal. 264, 274, 110

P. 951, and *Connel v. Higgins*, 170 Cal. 541, 150 P. 769, 772; *Monson v. Fischer*, 118 Cal. App. 503, 519, 5 P. 2d 628. Rescission of the contract in such case, however, must be within a reasonable time of the breach. Cal. Civil Code § 1691; *Brown v. Domestic Utilities Mfg. Co.*, 172 Cal. 733, 736, 159 P. 163; *Bancroft v. Woodward*, 183 Cal. 99, 107, 108, 190 P. 445; *Davis v. Rite-Lite Sales Co.*, 8 Cal. 2d 675, 682, 67 P. 2d 1039.

“Assuming that it was still reasonable for the Company to elect to rescind the contract because of the alleged breach of January 9, 1935, after the District had served its notice of suspension of work under the contract and had ousted the Company from the work, the fact remains that such an election was never made.”

Another and more recent case than the *Wenzel & Henoch* is

Transbay Construction Co. v. City and County of San Francisco, 134 F. (2d) 468 (1943).

San Francisco entered into a contract with Transbay Construction Company to raise O'Shaughnessy Dam, part of the city's water distribution system, 85 feet above its existing level. It was estimated by the city that 30,000 cubic yards of excavation would be necessary and it developed that 84,000 cubic yards had to be removed before a firm foundation was reached. This action and the fact that the city had ordered the additional excavation in small quantities delayed Transbay in completing the contract more than a year, for which Transbay sought damages.

The contractor knew after the excavation was completed that it would require additional time to complete the contract, but failed to give notice that it rescinded the contract or served notice on the city that it intended to continue under the contract and expected to be reimbursed for damages suffered.

In passing on the necessity for the rescission, the Court held at page 472:

“The suit is governed by local law. The California Civil Code, § 1688, provides that a contract is extinguished by its rescission. Section 1691 of the Civil Code states: ‘Rescission, when not effected by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules: 1. He must rescind promptly, upon discovering the facts which entitled him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right * * *.’ This statute has been strictly applied by the California courts. *Wills v. Porter*, 132 Cal. 516, 521, 64 P. 896; *Brown v. Domestic Utilities Mfg. Co.*, 172 Cal. 733, 159 P. 163; see *California Farm & Fruit Co. v. Schiappa-Pietra*, 151 Cal. 732, 91 P. 593.”

The effect of this decision is that as Transbay Construction Company failed to rescind its contract and proceeded with the work provided for under the contract it could not thereafter recover.

This doctrine of the necessity of rescission of a contract is nothing new or novel, as is evidenced by the decisions of our California Courts and of this Court. It was recognized under Roman and English law.

It was only fair and equitable for Soulé to unequivocally notify Union Co. that it expected to be relieved of its contractual obligation to pay for the construction of the falsework and interior framework so that Union, if it had a different interpretation from Soulé, would be accorded the opportunity of having some other steel company continue with the contract.

We believe that legally we have illustrated by the authorities cited that before Soulé Company could have recovered it was necessary that it give notice of rescission and rescind its contract. On this ground alone the entire case should be reversed.

POINT FOUR.

THE DISTRICT COURT ERRED IN ADMITTING PAROL EVIDENCE THAT TENDED TO ALTER THE TERMS OF THE WRITTEN CONTRACT BETWEEN UNION AND SOULE.

The record is replete with admissions of parol evidence over objections of counsel for the defendants and some of them are referred to in our specifications of error number 6. The contract between the parties to this action was written and dated and entered into on January 6, 1940. At page 226 of the transcript the following appears while Ross L. Mahon was being questioned by plaintiff's counsel:

Q. Directing your attention to the month of October, 1939, were you present at a conference between Mr. Soulé and Mr. Dowling?

Mr. Wrigley. Just a second, please. I want to object to this as irrelevant, incompetent and imma-

terial. The parties in this case entered into a formal written contract as of January 6, 1940 that superseded all prior negotiations, discussions, offers and everything else, and anything they may have agreed prior to that date was carried into the contract and cannot be admissible under the California Civil Code, Section 1625.

Mr. Moore. I did not want to argue that, if I could take this statement from the Colonel at this time. It will be very short, and then we can argue it later.

The Court. I will allow it subject to a motion to strike. * * *. (226, 227.)

Mr. Wrigley. May it please the Court, to save time, may it be understood that my objection goes to the entire line of examination without repeating it continuously?

Mr. Moore. It will be so stipulated. * * *. (227.)

At the Hotel Senator, Sacramento (228) October 4th (1939) (227) the witness stated he was in Mr. Dowling's room.

Q. Approximately what time was that?

A. I should say at least 10:00 or 11:00 o'clock in the evening, perhaps a little later, and I base that on the fact that Mr. Dowling was in bed at the time.

Q. Was anybody else there besides yourself and Mr. Soulé and Mr. Dowling?

A. To the best of my recollection, nobody was in that room when we talked this thing, except Mr. Dowling, Mr. Soulé, and myself.

Q. Now, will you relate the conversation as nearly as you recollect it?

A. A bid was presented to Mr. Dowling in which we quoted a price—my recollection is that it was \$33.80 a ton—on the reinforcing steel for this Pit River Bridge, installed, including, among other things, the cost of the unsupporting structure for same, that being in accordance with his expressed desire previously. (229, 230.) * * *

Mr. Wrigley. At this time I want to move to strike out the entire testimony of this witness on the ground that it is an attempt to vary the terms of a written contract which the parties formally entered into at a later date. Section 1625 of our Civil Code of California provides that the execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning matters which preceded or accompanied the execution of the instrument.

The Court. I will allow it to go in so we can have a record on the ground of the witness not being available, and it is all going in subject to your motion to strike and your objection, and I will give both sides an opportunity to examine into the matter fully. (230, 231.)

On cross-examination of J. A. Dowling the following occurred:

Q. As a matter of fact, on December 29, 1939, did you not have a conference at the office of the Soulé Steel Company with Mr. Cochrane, who was then your superintendent, Mr. Stevens, and Mr. Soulé?

Mr. Wrigley. I objected to that as incompetent, irrelevant, and immaterial, and an attempt to go back

over a written contract, which is prevented by Section 1625 of our Code. The parties agreed to a writing, in which the obligations of each party were stated. An attempt to reopen that in order to vary the contract I say is objectionable. (305, 306.)

Then followed an argument between counsel, and at page 320 we find:

The Court. The objection may be overruled. You may answer. (320.)

And thereafter counsel for defendants quizzed the witness on numerous incidents relating to matters occurring prior to entering into the contract and introduced a memorandum (Plaintiff's Exhibit No. 21) (324, 325, 326) dated December 11, 1939, that directly contradicts the terms of the written agreement. This document of December 11, 1939 was prepared prior to the entering into the contract between plaintiff and defendants, and the following occurred:

Mr. Moore. I will introduce this in evidence, your Honor.

Mr. Wrigley. Same objection.

The Court. Let it be admitted and marked.

(The document was thereupon received in evidence and marked "Plaintiff's Exhibit 21," and was read by Mr. Moore.) (323, 324.)

For the convenience of the Court, this plaintiff's Exhibit 21 is here reproduced and is as follows:

Plaintiff's Exhibit No. 21

Los Angeles
 Portland
 Houston

Telephone
 Valencia 4141

(Emblem) SS. Co. Iron and Steel Products
 Soule Steel Company
 Iron and Steel Products
 1750 Army Street, San Francisco

December 11, 1939

Gentlemen:

Re: Abutments and Piers, Pit River Bridge
 Relocation of Southern Pacific Railway and
 U. S. Highway 99

In regard to the labor of installing the reinforcing steel bars, Bid item No. 11, as specified for the construction of the above project in accordance with plans and specifications prepared by the United States Department of the Interior, Bureau of Reclamation, we are pleased to quote you as follows:

1. We are to receive the reinforcing steel bars f.o.b. cars Redding, California.

2. The 2" square bars are to be bent at supplier's mill, all other bars are to be furnished in straight lengths.

3. We are to be responsible for the unloading, checking and handling of said reinforcing steel upon arrival at Redding upon a lot to be provided by you. us, (~~We estimate the storage lot size should be about 150' x 350' and adjoining a rail track.~~) (the rental of which shall not exceed \$30.00 per month.*)

*Words in () were inserted in copy in pencil.

4. We will do the cutting, bending and shaping of 2" bars preparatory to welding, loading on to trucks and transporting to jobsite to conform to your construction schedule.

5. You are to provide an easy and accessible roadway from the main highway to the base of the piers and abutments as required and a leveled portion around the piers, (or a wooden trestle which we may be for our use.*)

6. We will furnish all labor (including insurance) to do the placing of the reinforcing steel, including tie wire and accessories under above bid item No. 11 (but not including welding). (Fig. 7 in circle.)

7. You ~~will pour concrete "pyramids"~~ (are to furnish wood supporting framework*) in the base of piers # 1, 2, 3, 4, 5, 6 and 7 (and/or will furnish and erect wood core forms and/or steel supports, against which the 2" bars can be supported.)

8. ~~We have provided in this proposal for a job engineer 16 months @ \$300.00 per month, which cost will be borne equally.~~ Marginal notation (omit).

9. Sufficient lights will be furnished by you; also power outlets will be available for our use.

Price: As specified for the above items, the unit price of \$24.80 per ton.

If a bond is required, the same will be for your account.

Payments are to be made on or about the 10th of the following month for 85% of the value of the work performed during the preceding calendar month, and the remaining 15% to be paid 30 days after completion of our portion of the work.

Note: We are not to be held responsible for failure by delay or default arising from strikes, lockouts or other contingencies beyond our control.

If the above is in accordance with your understanding, please accept in the lower left hand corner, and it will constitute an agreement between us.

Sincerely yours,

Soule Steel Company

By Edw. L. Soule

Accepted:

Union Paving Company

By (Figure seven in circle.)

(You are to pour concrete "sills" as required, in the base of the piers to support the reinforcing steel mats in the bottom of the piers. On the steel reinforcing mats, the steel shoes, which support the 2" vertical bars, are to be placed.*)

ELS:DL

Quotations subject to change without notice. All sales, contracts, or agreements subject to strikes, accidents or causes beyond the company's control. (324, 325, 326, 327.)

Again we find when Witness Lester Earl Stevens was called for plaintiff and was asked:

Q. During that period of time did you make various estimates with relation to the cost of placing the reinforcement steel, working in collaboration with Mr. Soulé?

A. Yes.

Mr. Wrigley. I want to object to this as incompetent, irrelevant, and immaterial, attempting to vary the terms of a written contract.

The Court. The objection is overruled.

A. Yes, we did.

Mr. Moore. Q. Did those estimates include supporting devices?

A. They did at first.

Q. Or supporting members?

A. Yes. (463.)

After tracing where he had gone, the witness said he returned to San Francisco December 28th (referring to the year 1939). (463.)

* * * * *

Q. Did you at that time revise the former estimates that had been made, or assist in the collaboration of that?

A. Yes, we did.

Q. And did those new estimates include or not include the reinforcing members?

A. They did not.

Mr. Wrigley. Same objection to this entire line of examination.

The Court. Read the question, Mr. Reporter.
(Question and answer read.)

The Court. The objection is overruled.

Mr. Wrigley. Will you stipulate, Counsel—

Mr. Moore. I will stipulate.

Mr. Wrigley (continuing). —that my objection runs to this entire line of examination, and I will in due course make a motion to strike out?

Mr. Moore. So stipulated. (463, 464.)

The record discloses (47) on April 19, 1943 the District Judge made the following order denying motions to strike all the evidence that was introduced

by plaintiff about facts occurring prior to January 6, 1940:

“The parties hereto being present as heretofore, the further trial of this case was this day resumed. Mr. Wrigley made a motion to strike certain testimony, and after argument by Mr. Wrigley and Mr. Moore, it is ordered that said motion to strike certain testimony be denied. The evidence being closed, and the case, after argument by the attorneys, being submitted and fully considered, it is ordered that judgment be entered in favor of plaintiff on findings of fact and conclusions of law, and that the defendant take nothing on the cross-claim.” (47.)

The foregoing illustrations, which are only a few of many, are deemed sufficient to call this Court’s attention to the admission of evidence of conversations and acts occurring prior to the execution of the contract between the parties litigant.

We respectfully contend that this is reversible error on the part of the District Judge.

The Court’s attention is directed to section 1625, Civil Code, reading as follows:

“§ 1625. (Effect of written contract.) The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.”

And under the heading of Rules of Interpretation of Contracts, the following sections of the Civil Code are called to the Court’s attention:

“§ 1638. Intention to be ascertained from language. The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.”

“§ 1639. Interpretation of written contracts. When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this title.”

“§ 1641. Effect to be given to every part of contract. The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.”

“§ 1643. Interpretation in favor of contract. A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties.”

“§ 1649. Interpretation in sense in which promisor believed promisee to rely. If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it.”

We also believe that section 1856 C. C. P., in so far as the first paragraph of that section, applies. We do not believe that it falls within the exceptions thereafter noted in the section.

Section 1856 reads in part:

“§ 1856. An agreement reduced to writing deemed the whole. When the terms of an agree-

ment have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases: * * *."

In construing the sections above referred to, *Cal. Jur.* Vol. 6, at pp. 297, 298, under the caption of *Contracts*, states the basis upon which the reconciliation between the sections should be made:

"But, it has been declared, section 1860 of the Code of Civil Procedure is not to be read as applicable to every contract that may come before the court for interpretation. It has its limitations and must be read in connection with other provisions of the code. To give it literal and universal application would bring it into direct conflict with section 1856 of the Code of Civil Procedure, which provides that, as a general rule, a contract in writing is presumed to contain all the terms of the agreement. Section 1625 of the Civil Code must also be read and harmonized with section 1860 of the Code of Civil Procedure. It reads:

" 'The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.'

"It is only where it is doubtful, uncertain or ambiguous that the surrounding circumstances become important in ascertaining the intent of the parties. The rule of evidence embodied in the code sections quoted above is invoked only

in cases where upon the face of the contract itself there is doubt, and the evidence is used to dispel that doubt, not by showing that the parties meant something other than what they said, but by showing what they meant by what they said. These sections of the code simply enact the common-law rule, and it is not within their contemplation that a contract reduced to writing and executed shall have anything added to it or taken away from it by such evidence of 'surrounding circumstances.' Where the parties have themselves used words which require no interpretation, where the words are understood, there is no occasion for aid to their proper interpretation of meaning. * * *

Some of the more recent cases sustaining the above text and that it is the duty of this Court to construe, irrespective of what findings may have been made by the District Court as to its interpretation of the agreement, are:

Brant v. California Dairies, 4 Cal. (2d) 128, 133, 134, 48 Pac. (2d) 13;

Tanner v. Title Ins. Trust Co., 20 Cal. (2d) 814, 824, 129 Pac. (2d) 383;

Watson v. Peyton, 10 Cal. (2d) 156, 73 Pac. (2d) 906.

It is respectfully submitted that the contract between the parties litigant is clear, positive and certain and there is no latent ambiguity therein or writing that requires any technical interpretation so that the true intention of the parties may be determined. The contract provides that Soulé would supply "or other materials and appliances used for securing reinforcement bars, metal or other temporary supports," (14) and

at its own cost will provide "all labor, materials and equipment and cut the ends of the bars for welding and provide all clamps, tie rods, cables, blocking, anchors, and other accessories that may be required, including the placement of backing-up strips and shall firmly and securely hold the reinforcing bars in position while the joints are being welded * * *" (14, 15) and at its own cost agrees to "provide all labor, materials, tools, accessories and equipment and perform and observe all the provisions" (15) that are contained in paragraph 66 of the contract between Union and the Department of the Interior.

That the Court should not have gone outside of the written, unambiguous agreement is further emphasized as Union Company undertook to build some of this falsework and interior framework on certain abutments and "construct a wooden trestle over and about the base of all pier excavations and construct wooden cores as shown on the plans which may be used by the subcontractor as a supplementary support for reinforcement bars;" (16).

The contract was entered into January 6, 1940, and the Court permitted interested parties to testify beginning April 8, 1943 as to conversations held three years and three months after they had occurred. This we emphasize as clearly unfair on the part of the District Court to allow such testimony in the record, as the minds of men are finite and most of us have difficulty in recalling what was said a short time ago, much less what may have been said three years and three months ago. Hence written contracts were evolved and are to be taken and mean what they say.

We therefore conclude that we have illustrated the contract was unambiguous and provided that Union Company was to do the falsework and interior framework on the cores of the piers which it did and charged itself for this work and that Soulé Steel Company, because of the nature of its work had to, above the foundation lines, build falsework and interior framework to put up the reinforcement bars.

We have illustrated the District Court failed to give credit to the cost of templates, labor and incidentals for work that Soulé Company admits was its own and should be charged with it.

Next we illustrated the inequity on the part of Soulé in not rescinding its contract immediately following October 15, 1940 when it knew that it was to be charged with the cost of the interior framework and falsework, which we emphasize is an insurmountable barrier preventing Soulé from recovering, and lastly we have pointed out the legal errors committed by the District Court in accepting parol evidence to vary the terms of an unambiguous written contract.

For the reasons stated, the case should be reversed and judgment ordered in favor of Union Paving Co. and all other defendants.

Dated, San Francisco,
February 14, 1944.

Respectfully submitted,

DION R. HOLM,

HENRY F. WRIGLEY,

Attorneys for Appellants.

No. 10,571

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

UNION PAVING Co. (a corporation), PACIFIC
INDEMNITY COMPANY (a corporation)
and MARYLAND CASUALTY COMPANY (a
corporation),

Appellants,

vs.

UNITED STATES OF AMERICA, for use and
benefit of Soule Steel Company (a corpo-
ration),

Appellee.

BRIEF FOR APPELLEE.

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UNITED STATES OF AMERICA, for use and
benefit of Soule Steel Company (a corpo-
ration),

Appellee.

BRIEF FOR APPELLEE.

Since (App. Br. 22-27) appellants' point one and point four (App. Br. 35-48) relate to the interpretation of the contract, we will reply to these two points as a unit, and will then deal separately with points two and three.

(NOTE): For convenience, appellee Soule Steel Company will be referred to herein, as subcontractor, Steel Company, or plaintiff, and appellants Union Paving Co., Pacific Indemnity Company, and Maryland Casualty Company will be referred to as Union Paving Co., Paving Co., or defendants.

All emphasis is supplied unless otherwise noted.

References to pages of the Transcript of Record are indicated thus: (Tr. p.) and to Appellants' Opening Brief (App. Br.).

REPLY TO POINTS ONE AND FOUR.

The question voiced in appellants' points one and four, upon which the parties are in violent conflict is—the interpretation, construction and meaning of their contract.

The trial court after examining the contract and after the taking of evidence in finding VIII (52) found

“The Court finds that said contract is uncertain, ambiguous and indefinite in that it does not clearly and certainly appear therein whose duty and obligation it was to so erect and pay the cost of the erection of said falsework, scaffolding and interior framework in said abutment No. 1 and in said piers.”

If this finding is justified, then the appeal urged by appellants in points one and four is without merit.

A.**CONFLICTING CONTENTIONS AS TO THE MEANING
OF THE CONTRACT.**

Although parol evidence is not admissible to vary the terms of a written contract, appellant appreciating that nevertheless it is admissible to explain uncertainties and ambiguities, claim the contract was unambiguous and provided as follows:

“We therefore conclude that we have illustrated the contract was unambiguous and provided that Union Company was to do the falsework and interior framework on the cores of the piers which it did and charged itself for this work and

that Soule Steel Company, because of the nature of its work had to, above the foundation lines, build falsework and interior framework to put up the reinforcement bars." (App. Br. 48.)

Appellant reached this conclusion in the following manner: In the heading of point one (App. Br. 22) they state the steel company was to pay for *all* of the temporary framework in the piers and abutments. They refer to section 66 of the general contract which requires the contractor to so place and secure the reinforcing bars in position, that they will not be displaced during the pouring of the concrete. (App. Br. 22-26.) They also point to other language in sections 24 and 45 of the general contract requiring the contractor to provide mechanical devices to hold the reinforcing bars in place during the pouring of the concrete.* Nothing is said in either sections 24, 45 or 66 of the general contract as to the manner in which the reinforcing bars should be secured in place; likewise, there is nothing in the subcontract which in any way describes or delineates the type of structure that should be erected to hold the reinforcing bars in place. Both the general contract and the subcontract are silent on this subject.

Since, under the contract, the paving company was required to construct the wooden cores in the two

*No point is made by appellants that the Steel Company did not provide these mechanical devices, the appeal being limited to the falsework, scaffolding and interior framework. Soule testified at length as to what was done in providing and installing these mechanical devices (101-104).

larger piers, appellant combined this provision with the general requirements of section 66 and reached the foregoing conclusion as to the meaning of the contract. The claim that the contract required the steel company to erect all of the framework, except around the cores, is not supported by any specific language found in the contract, because there is none, but is attempted to be based on the doctrine of *expressio unius est exclusio alterius*. Appellants say

“If it were not intended under the subcontract that the Soule Company was not to build the falsework and interior framework, there was no reason to state that where there were cores in the piers that Union Co. would undertake to build those, and which structures could then be used by Soule to support the reinforcement bars. If Union Co. were supposed to build all the falsework and interior framework, what would have been the purpose of incorporating the section of the contract last quoted?” (App. Br. 27.)

Appellants, however, studiously avoid any mention of one very vital provision of the contract which reads as follows:

“the subcontractor agrees that it will proceed with the placing of the reinforcement bars in sections of the piers and abutments made ready for such placement immediately after being notified by the contractor of the readiness of each section.”

The above clause required the paving company to make the *sections* of the piers and abutments ready for *placement*. Nowhere in either contract is there

any definition of the meaning of *sections* of piers or any statement of what the paving company was required to do in order to make these sections *ready for placement*. Both contracts are silent.

Soule maintained that his original bid had contemplated modes of support other than an interior framework and that the promise of the right of free support had greatly reduced his original bid price. He claimed that after negotiations, an understanding was reached by the parties that the paving company was to erect the falsework and interior framework for the primary purpose of pouring concrete and that Soule would be entitled to use it without cost for the secondary purpose of supporting the reinforcing steel. Soule claimed that the clause requiring the paving company to make the sections of the piers ready for placement meant that the paving company would erect this interior framework, which could be used by the steel company for placement of the steel.

After taking evidence the trial court found in regard to this clause

“The Court further finds that the plaintiff at the time of the execution of the agreement of January 6, 1940, understood the following provision contained therein:

(Here appears the contract clause previously quoted) to mean and the Court hereby finds it did mean that said defendant, Union Paving Co., would erect and pay for the cost of the erection of said falsework, scaffolding and interior framework, and that plaintiff would have the right to

use the same without cost to support, place and secure the reinforcing bars. That said defendant, Union Paving Co., at the time plaintiff executed and signed said agreement of January 6, 1940, knew that the plaintiff understood the foregoing provision of the agreement in the manner above set forth." (Tr. p. 53.)

In order to understand this finding and the conflict between the variant contentions of the parties, one has to be cognizant of the evidence which was admitted both prior and subsequent to the criticized ruling of the trial court. Appellants in their brief fail to state any of the evidence thereby placing upon us the burden of relating it. In stating the evidence we will point out how it has forced the appellant on this appeal to take first one contrary position after another, each of which is contrary to their interpretation of the contract, even forcing them to admit that no agreement was ever reached upon the very subject matter in regard to which they now claim the contract is clear and unambiguous.

B.

THE EVIDENCE WHICH PRECEDED THE CRITICIZED RULING OF THE TRIAL COURT, TOGETHER WITH THE STATEMENTS AND ADMISSIONS FOUND IN APPELLANTS' BRIEF CONCLUSIVELY ESTABLISH THAT THE FINDING OF THE TRIAL COURT THAT THE CONTRACT WAS UNCERTAIN WAS AMPLY JUSTIFIED.

1. THE EVIDENCE.

- (a) The defendant set up its cost records and books of account in accordance with Soule's interpretation of the contract.

Before the job commenced and at or about the time of the contract, the paving company set up a system of keeping costs. (Exhibit 16, pp. 216-220.) Accounts Nos. 7, 8, 9 and 10, covered the costs of the concrete in the piers and abutments, and particularly "Account No. 9" covered the concrete in Piers No. 1-7. "Above Top of Bases." Each one of these four accounts had thirteen sub-headings, among which were sub-item 1—"Forming"; sub-item 3—"Build Falsework"; and sub-item 4—"Build Runways". Account No. 11 was for "Reinforcing Steel (Sub-contract)." Mr. Loren Hunt, the cost engineer for the paving company, testified that acting under instructions of Mr. Dowling and Mr. Cochrane (respectively the manager and superintendt of the paving company), that when he, Hunt, opened up the cost record keeping he charged all of the costs now in controversy to the concrete and none of it to item No. 11 which was the reinforcing steel account. (Rep. Tr. pp. 221, 259, 260.) Labor costs as shown by the daily time sheets and summaries (Exhibits I and J) were charged in the same manner. Furthermore, the dis-

puted costs were carried on the general books of account of the paving company up until October 15 as a part of the cost of the paving company's part of the job and no charge was made against Soule. (Testimony of Dowling, Tr. pp. 304, 305.) The paving company thus set up their own cost records and their general books of account in exact accordance with Soule's version of the meaning of the contract, and exactly contrary to the present claims of the appellant.

- (b) **The paving company purchased the material and paid for the labor in constructing the framework without consulting with the steel company and never made any demands of the steel company that they construct the framework.**

During the progress of the job, up to October 15, the paving company built and constructed this falsework and framework and in doing so paid the wages of the men, bought and paid for all the materials which were used, did not consult with the steel company either in regard to the purchase of these materials or the price that should be paid, nor in regard to the manner in which this construction work should be carried on. (Dowling, Tr. p. 305.) During the same period the paving company did not make any demand that Soule install any of this falsework or framework. (Dowling, Tr. pp. 302, 303.)

- (c) **The steel company for a period of six months rendered bills for the steel erected and the paving company paid the bills without objection and without any claim of offset.**

The placing of the steel commenced in March 1940 and beginning on March 31, 1940 Soule in accordance

with the contract rendered monthly statements to the paving company showing the amount due for the steel placed during the preceding month. (Plf. Exs. 1-6, Tr. pp. 80-84.) On the monthly bills the paving company paid \$5000.00 in July; \$12,486.25 in August and on September 21, 1940—\$9126.04; or a total of \$26,612.29, which practically paid the contract in full on the monthly billings that had been rendered up to that time. Dowling testified (Tr. p. 303):

“Q. That practically paid your contract in full.

A. Up to that time.

Q. On the monthly billings that had been rendered to that time.

A. Yes.”

Up to October 15 no objections were voiced by the paving company as to the amount of these monthly billings nor was any claim ever advanced by the paving company that these monthly statements did not correctly represent the amount which was then owing to the steel company or were subject to off-set. (Dowling, Tr. p. 302.)

(d) Ten months after the contract was signed the paving company for the first time made a claim that there was any obligation on the steel company to erect the framework.

The September billing was rendered September 30. (Plf. Ex. 7, Tr. p. 85.) This billing had not been paid two weeks later, on October 15. From this time onward the paving company made no further payments until January 18, 1941, when they paid \$20,000.00. (95.) At the time of the completion of the

job, according to the final monthly billing (89), as per the statement rendered July 15, 1941 (Plf. Ex. 12, Tr. pp. 93, 94 and 95), the paving company was indebted to Soule in the sum of \$77,352.62. Six and one-half months after the job was completed, on December 31, 1941, the paving company paid an additional \$16,000.00 (59) which reduced the account to \$61,352.62, which is the amount now in dispute.

All of the pertinent portions of the evidence summarized in subdivisions a, b, c and d are ignored in appellants' brief, reference being made solely to the billings by Soule, the amounts paid, and the cessation of monthly payments.

- (e) The managing head of the paving company testified that no agreement was ever reached in regard to the framework.

Dowling who negotiated and executed the contract, testified directly, positively, and unequivocally that no agreement ever existed in regard to the framework:

“Mr. Dowling. A. I asked him (Stevens) to sit down with us and adjust or come to some agreement of how the charges for the interior structure should be apportioned. He said he would take it up with San Francisco. Nothing happened until along about in September, again.

Mr. Moore. Q. Of the same year?

A. The same year. The same thing happened with no results. So I told him we would pay no more money for that work until such time as we could get a settlement or some adjustment of some type.” (Tr. pp. 278, 279.)

“Mr. Wrigley. Q. Going back to the request of July, give us the substance of what you said, and what his reply was.

Mr. Dowling. A. Well, I said to Mr. Stevens, *‘Don’t you think it is about time now that we ought to get together and agree on how to apportion our respective costs for the interior framework?’* ” (Tr. p. 296)

the September conversation:

“Mr. Dowling. A. *I asked him if he made up his mind or determined how we should split the charges, and he said he had not. And then I said that we would be compelled under the circumstances to withhold payments beyond that time until some definite understanding had been made, those payments to cover the approximate cost of his share of the work.*” (Tr. p. 297.)

(f) **The cost engineer revised his records in order to set up the basis of the present cross-complaint.**

On October 12 Hunt received a letter from the San Francisco office of the paving company (Pl. Ex. 14, Tr. p. 260) and shortly thereafter received the following instructions:

“Mr. Moore. Q. After you received that, did you receive any further instructions as to what you should do?

A. Yes.

Q. What were those?

A. To go back through the records—first, to continue and distinguish between internal false-work as we progressed, and that was set up, and we had three shifts of timekeepers eventually set

up, and I think the first date was about the end of October when that was carried and put in effect.” (Tr. pp. 260, 261.)

(g) The cost engineer adopted an arbitrary division of costs.

The first of these revamped charges was completed on November 28, 1940, and the second one on January 14, 1941, Hunt testifying as follows:

“A. That covered piers—November 28th—summary of materials that went into the construction of the steel supports and falsework of piers 2, 3, 4, 5, and 6 up to the time we started to take an accurate account of the materials used.

Q. In other words, you went back over the records which had previously been charged to pouring concrete and took these figures from them?

A. Yes, and also a print we made of the typical sketch—a typical sketch of the typical layout.

Q. After taking this out of the other charges, these are included in the bill that is now rendered against Soule?

A. That is right.

Q. Will you tell us the next date?

A. January 14, 1941.

Q. That is a letter by yourself to the home office, is it?

A. Yes. ‘Enclosed is a summary of the materials that went into the construction of the steel supports and falsework for Piers 1 and 7.’

Q. That was compiled in the same manner, was it?

A. In the same manner, yes.” (Tr. p. 262.)

(h) By this arbitrary division the paving company charged the steel company with approximately two-thirds of the cost of the framework.

This revamping of the cost records by Hunt is the basis of the \$61,112.62 claimed in the cross-claim.

The manner in which Hunt divided the charges between the paving company and the steel company was explained by Hunt.

“Q. You drew a distinction between whether it was supported on the inside framework or whether it was supported on the outside forms, is that correct?

A. The distinction can be stated a little differently, but that is all right.” (Tr. p. 258.)

As a result of Hunt's work a bill was subsequently rendered Soule (Ex. K, Tr. p. 205) which purported to cover Soule's share of the cost of the temporary support in Piers 1-7 inclusive and abutment #1. No charge was made against Soule for piers 8, 9, and 10 nor abutments 2, 3, and 4. This more fully appears in the division of cost prepared by the paving company:

TOTAL COST OF CONSTRUCTING SUPPORTS FOR REINFORCING STEEL, TEMPLETS, SPACERS,
FALSEWORK, RUNWAYS, etc. for use in Piers and Abutments—Pit River Bridge.

Chargeable to Union Paving Co.:

Runways:		Labor	Material	Total	Falsework:	Labor	Material	Total
Abutment	1	\$ 1,729.54						
	2	731.17				\$ 1,098.31		
Pier	1	1,507.01						
	2	3,963.64						
	3	6,417.05				4,159.57		
	4	4,828.23				1,726.43		
	5	2,517.63	\$ 5,268.55				\$ 3,149.90	
	6	2,210.02						
	7	1,092.18				166.70		
Abutment	3	2,187.22				1,233.59		
Pier	8	1,880.84				826.24		
	9	1,273.06				417.69		
	10	1,817.58				420.58		
Abutment	4	640.21				376.86		
Totals		\$32,795.38	\$ 5,268.55	\$38,063.93		\$10,425.97	\$ 3,149.90	\$13,575.87 38,063.93
								\$51,639.80 5,163.98
10 % Supervision							Total	\$56,803.78

Chargeable to Soule Steel Co.:

Temporary Supports Labor

Abutment	1	\$ 2,905.64
Pier	1	784.71
	2	5,358.26
	3	13,263.77
	4	8,417.89
	5	2,478.63
	6	2,457.19
	7	2,185.00

Totals \$37,851.09
10% Supervision

Miscellaneous Charges

Moving & Repairs to Boom
Additional Miscell. Charges

[Pencil Notation]:
56803.78
61112.62

Total 117,916.40

[Endorsed]: Filed 4/9/43.

Material	\$ 380.28
	125.52
	2,781.75
	5,332.02
	4,732.63
	1,059.17
	493.61
	730.49

Totals \$15,635.47

Total	\$ 3,285.92
	910.23
	8,140.01
	18,595.79
	13,150.52
	3,537.80
	2,950.80
	2,915.49

Totals \$53,486.56
\$58,835.22

\$ 1,893.82
383.58
2,277.40

Total \$61,112.62

An analysis of the foregoing segregation of costs is interesting. Since Soule was charged for a portion of the cost in only eight piers and abutments, we have therefor printed in red ink in the copy of Ex. X printed herein those items on these eight piers and abutments with which Union have charged itself, and they total \$38,736.45. Union charged Soule \$53,486.56 as its share of the cost. It thus appears that the actual construction cost for the framework on these eight piers and abutments amounted to \$92,223.01 of which Soule was charged approximately 58%. In addition to charging Soule with his share of the actual cost they charged Soule with a 10% supervision cost amounting to \$5348.66, or a total of \$58,835.22. It is true that Union charged itself with a 10% supervising fee, but this is mere bookkeeping, and not actual money. Therefor, if they collected from Soule the 10% supervising fee charged him, it reduced the actual cost to Union a like amount, making the total paid by them \$33,387.80. Therefor, of the actual cost of construction Soule would be paying approximately 66 $\frac{2}{3}$ % and the Union 33 $\frac{1}{3}$ %. In addition Hunt admitted that the \$3,285.92 charged to Soule for abutment #1 was heavily padded. (Tr. pp. 243-246.)

The Dowling-Stevens conference, and the revamping of the accounts by Hunt could not be ignored by appellants and is reflected in their opening brief.

2. INCONSISTENCIES AND CONTRADICTIONS IN APPELANTS' OPENING BRIEF CAUSED BY THE TESTIMONY PREVIOUSLY OUTLINED.

Although appellants contend that the contract required Soule to erect or pay the cost of erection of *all*

the falsework and interior framework in *all* of the piers and abutments (except the framework above the cores), nevertheless, they admit that Soule was not charged for the falsework and interior framework in *all* of the piers and abutments but was charged for the falsework and interior framework *in only a part of the piers and abutments*, in that no charge was made against Soule for falsework or temporary supports in abutments Nos. 2, 3, and 4, or piers 8, 9, and 10.

“No charges were made against Soule for falsework or temporary supports on abutments 2, 3, and 4 or piers 8, 9, and 10. (286, 287, 302.)

These abutments and piers were smaller units and the reinforcement bars were placed in position and rested on rock base or concrete curbs or sills and were self-supporting. They required no welding or falsework to support them.

This case concerns the reinforcement bars placed in abutment 1 and piers 1, 2, 3, 4, 5, 6, and 7. The reinforcement bars used in these piers are about 2" square and in 60-foot lengths and weighing approximately 900 pounds, required welding and falsework or interior framework to support them as they were placed in a variable oblique or sloping position.”

(App. Br. 7.)

No language of the contract can be pointed to which, in the slightest way, indicates why Soule was to pay for the temporary supports in eight of the fourteen piers and abutments, or why the paving company was to pay for the temporary supports in the other six

abutments and piers. The only explanation found in appellants brief is—that the six piers and abutments for which no charge was made were smaller and the type of construction was different from that for the eight for which charge was made. No language in the contract can be pointed to, which justifies Soule's being charged for the framework in certain piers and abutments and not for others.

Soule not only was not charged for *all* of the falsework and interior framework in *all* of the piers and abutments, but was charged for only a portion of the cost of the falsework and framework in abutment No. 1 and piers 1, 2, 3, 4, 5, 6 and 7.

“The total cost of constructing the falsework was \$117,916.00. (286, 287.) Of this sum Union Paving Co. charged itself with the amount of \$56,803.00 and charged to Soulé \$61,112.00 (287).”

Soule was therefore not charged for any of the cost in six piers and abutments but according to appellant was charged for only slightly over half of the cost of the construction of the falsework and interior framework in all of the piers and abutments.* Nowhere in the contract is there any provision which provides for a division of the cost of these eight piers and abutments, or any provision that Soule should bear some proportionate share of this cost.

Furthermore appellants admit that no such agreement was ever reached in regard to this sharing of costs, and that therefor since no agreement existed

*As previously pointed out actually Soule was being charged approximately $66\frac{2}{3}\%$ of the cost of the eight piers and abutments.

the paving company took upon itself to arbitrarily divide the costs of the erecting of this interior framework, making this division without consulting the steel company, and having done so, deliberately withheld the amount which it had arbitrarily assessed against Soule.

Appellants say:

“When Union, through J. A. Dowling, its manager, was unable up to October 15, 1940, *to reach an agreement* with Mr. Stevens, the partner and representative of the Soule Company, at the place of construction, *as to the proportion of cost for falsework*, Union then set up its books in a more than equitable fashion, charging the cost of all the falsework and interior framework which it had constructed and paid for on the equitable basis of \$56,803.00 to Union Paving Co. and \$61,112.00 to Soule Steel Company. (Exhibit Y, 286, 287.) No charges were allocated against Soule for abutments 2 and 4, or piers 8, 9, and 10.”

(A. B. 27.)

This statement negates and destroys the fundamental premise of the appellants' appeal. If Union “was unable up to October 15, 1940, to reach an agreement”, then no agreement had, up to that time, been reached. If there was no agreement, then by what right, or under what term of the contract, did Union divide the cost in a manner which they thought was equitable by charging approximately 33 $\frac{1}{3}$ % to Union and 66 $\frac{2}{3}$ % to Soule? If a definite and unambiguous agreement existed, why should Union, nine

months later, be trying to reach an agreement on the same subject matter? What provision of the contract can be pointed to which provides that the cost of construction should be divided equitable? Particularly, what provision of the contract is there, which would permit the paving company to act as the judge of what would be an equitable division, and charge Soule $66\frac{2}{3}\%$ of the actual cost?

It thus appears from the appellants' own statements: that in construing the contract they have ignored an important provision of the contract which the trial court interpreted adversely to them; that they arrived at an interpretation favorable to themselves by deduction rather than by reference to any unambiguous language; that they admit that the sum withheld and now in dispute bears not the slightest relation to their interpretation of the contract; that they affirmatively aver that no agreement was ever reached upon the very subject upon which they now claim the contract is unambiguous; and, finally they state that because of such lack of agreement they took upon themselves to divide the cost in a part of the piers in a manner which they considered equitable. How, in the face of such a record, appellants can seriously contend that the contract is unambiguous passes understanding.

C.

**THE DISPUTED RULING AND THE TESTIMONY INTRODUCED
AS A RESULT THEREOF.**

With the evidentiary record in the shape, we have already outlined, the following question was asked Mr. Dowling and the following objection was made (Tr. pp. 305-306 (d)):

“Q. As a matter of fact, on December 29, 1939, did you not have a conference at the office of the Soule Steel Company with Mr. Cochrane, who was then your superintendent, Mr. Stevens and Mr. Soule?

Mr. Wrigley. I object to that as incompetent, irrelevant, and immaterial, and an attempt to go back over a written contract, which is prevented by Section 1625 of our Code. The parties agreed to a writing, in which the obligations of each party were stated. An attempt to reopen that in order to vary the contract I say is objectionable.”

In the argument of counsel which followed (306-320) the evidentiary record was reviewed, the terms of the contract discussed and practically the same arguments were advanced by the defendant as are to be found in their brief, after which the objection was overruled.

The evidence which was subsequently introduced was so convincing that it would have justified the reformation of the contract if it had been contrary to Soule's contentions.

(1) SOULE'S TESTIMONY.

Soule says that on October 4, 1939, which was the day before the bids were opened by the United States Government, that he and Ross Mahon (Soule's engineer), had a conference with Dowling at the Senator Hotel in Sacramento. At that time they gave him what was known as a going-in bid which bid included the cost of supporting devices. (Tr. p. 372.) Mahon corroborates Soule, stating the bid was \$33.82 a ton. (Tr. pp. 229, 230.) Soule says that after this first meeting he and Mahon were constantly in contact with Dowling. That he got a copy of the plans and specifications from the government and sent them to his Los Angeles office and had a check estimate made and that the Los Angeles office also made up a large scale drawing of pier No. 3 showing the reinforcing bars, as to where they were located in the pier and where the bars lapped and weld. This large scale drawing is marked Pl. Ex. 22, for identification (Tr. p. 374), and was subsequently admitted in evidence. (Tr. p. 387.) Soule says he had several talks with Alex Cochrane (Dowling's superintendent), and Cochrane asked him how he expected to support the reinforcing bars, and Soule told him he intended to erect what is called a structural triangle to the slant of the bars, plus a supporting member, and Cochrane said it was not a good way to coordinate the two contracts, that if they put up these triangular structural pieces it would mean a large expenditure of money, and that they, the paving company, intended to put up false-work to support their runways from which they would

pour their concrete; that they had a discussion as to getting the job coordinated because the paving company was trying to get the best price it could. (Tr. pp. 375, 376.) After this conference with Cochrane he, Soule, refigured his estimates, and on December 9th Stevens flew down from Seattle and went over the estimates and they pared their estimate down to \$28.60 a ton, that they then took out the amount they had calculated for the supporting means, which was \$3.70 a ton, which made \$24.83; they then dropped the 3¢ and made an estimate price of \$24.80 a ton. On December 11, two days later, Soule dictated in letter form, a proposed memorandum of contract with the paving company. (Tr. p. 377.) Soule and Dowling went up to the job site on December 20th or 21st and Soule's recollection is that on the train he gave Dowling a copy of this proposal. (379.)

Approximately a week later, on December 29, 1940, Soule, Stevens, Dowling and Cochrane met at Soule's office about 8 o'clock in the morning.

"A. We had a short talk in my office, and then we proceeded upstairs to the engineering department, to discuss the method of the false-work which the Union Paving Company said that they were going to use for their own use, that they were required to build, which they would have runways on, and on which the workmen would wheel their wheelbarrows and pour the concrete. That was the principal subject and reason for the visit, for that discussion.

Q. You mean up to the drafting room?

A. Went up to what we call the reinforcing engineering department.

Q. This map that you identify here, was that before you at the time, Mr. Soule?

A. We took this original plan showing the outline of the pier, and Mr. Alec Cochrane proceeded to tell me how he was going to build this inside falsework. I took the T-square and a triangle, and as he proceeded to tell me how he was going to do this, I put down the work in here. He said, 'I would use a 10 by 10 with about 10 foot centers'. And as he would tell me, then I would put down that work.

He told me about the pouring, of the elevations at which it would be required on account of the pouring. The specifications said in instances of big bulk work, in order that the concrete might not heat up too much, and so forth, that you had to limit them to five-foot pours.

We discussed very thoroughly the places at which each of the bars would splice, and, of course, we had to stop the pour at a workman's height in order to weld those bars. That could not be done down on their stomachs; they could be higher, but it would not be very economical. And a discussion was held as to the different welding points. This shows at all the elevations where they had to be welded, so therefore you had to stop the pouring at different places. For example, this bar came down and was broken there. Of necessity, you would have to stop the pour there. These beams came in at this elevation, and here are red marks showing the different elevations at which the pours of necessity have stopped for construction purposes.

Q. Did all this conference take place in the presence of Mr. Dowling?

A. Mr. Dowling was present at all times.

I remember Mr. Cochrane stating to us, after we had this all delineated out there and they were leading up to the subject of the price at which we would quote on this work—and I remember that Mr. Cochrane remarked, ‘Now, boys, it looks like a different picture to you now, doesn’t it, that you know the type of falsework that we are going to construct for our own use?’

And then he went on to state that this falsework is to be for the use of ourselves in the pouring of the concrete, supporting these runways, and stated to us that he would in all instances turn this over to us for our own use. The explanation seemed to be very clear to us.

A. To lunch, down to Mannings’ on Brannan street. When we came back we went up there and had a further discussion over the points that were brought out in the morning, and further, Mr. Cochrane explained to us after they built this inside framework, if there was any templating required, that is, if you had to bring the bars out to the exact tolerances as shown on the plans, that should be for our own account. If after they did the bracing, did the construction of this work and did the bracing, and, in our judgment, that bracing was not sufficiently strong—for example, if we desired to put more bars on one side than we did on the other for an unbalancing, then if there was any extra bracing, then that should be for our account.

Q. That was all discussed at that time?

A. We had a full and complete discussion, and present at that meeting was Mr. Dowling, Mr. Cochrane, Mr. Stevens and myself, and in the room, the engineering room, was Mr. Short, Houden, Ubigau.

Q. After you went up to the drafting room again what then happened, Mr. Soule?

A. After we had a full explanation as to how this was to be done, Mr. Dowling remarked, 'Now, boys, you get your figures together on this explanation as we have shown it to you, and we will turn this over to you free of charge for your use in all instances, and Alec and I will take a walk out here and look over the housing project.'

They were gone about an hour, and when they came back we went into my room, in the corner, downstairs, and Mr. Dowling said, 'Well, now, boys, have you got that price down? What is your final price?'

And Mr. Stevens and I had again looked over our estimate in light of the explanations of their furnishing the falsework, and that estimate in the file shows we calculated, we came to \$23.60 on the basis that the Union Paving Company would furnish the falsework. We felt that we would try to get \$24, so when Mr. Dowling came back and asked us for a price, we started at \$24.

Q. What price did he offer?

A. Mr. Dowling offered us a price of \$21.50 to \$22. Finally, some horse trading went on between us, until Mr. Dowling's price had raised to \$22.25, and our price had lowered to \$22.75, and it looked like we were just in a complete deadlock, because we had dropped below our \$23.60 price. And Mr. Stevens and I had agreed we thought we were get-

ting down to as low as we should possibly go on such a hazardous job. Finally, Mr. Stevens and Mr. Cochrane, who were sitting a little bit to the back of us—Mr. Cochrane suggested, ‘Why don’t we split the difference?’ We split the difference, and that became the basis of our bid of \$22.50 a ton.

Q. At that meeting did you have a copy of this bid of December 11th?

A. I did.

Q. I will hand you one. There are certain pencil interlineations in there. Whose handwriting are those in?

A. That is in my handwriting.

Q. You saw the one that was introduced in court this morning, produced by Mr. Dowling?

A. Yes, sir.

Q. That is in your handwriting, too, is it?

A. That is a duplicate of this one.

Q. Under what circumstances was that handwriting placed on that document?

A. In other contracts it was usual that we get out the contract, and I suggested that we prepare the contract, believing that the form that we generally had there covered the conditions. Mr. Dowling said he wanted to get out the contract. So I therefore took one of these copies, and I know this was my particular copy—I scratched out the \$24.80, and I put on the things that we had agreed to. Paragraph 5 states,

‘You are to provide an easy and accessible roadway from the main highway to the base of the piers and abutments as required and a leveled portion around the piers, or a wooden trestle which may be for our use.’ Paragraph 8:

'You are to furnish wood supporting frame work.'

Q. That was put in there by you, was it?

A. That was put in there by me.

Q. On the back there is a 7.

A. 7 couldn't be written in that part on account of the space. 7 was turned over to read,

'You are to pour concrete sills as required, in the base of the piers, to support the reinforcing steel mats in the bottom of the piers. On the steel reinforcing mats, the steel shoes, which support the two-inch vertical bars, are to be placed.'

Q. Were those various provisions discussed between you and Mr. Dowling at the time you made those interlineations?

A. They were. It was brought right up to date and agreed to right at the time.

Mr. Wrigley. I ask that that statement, that it was brought up to date, be stricken out.

Mr. Moore. It may go out.

Mr. Wrigley. In other words, he can say what was said, but his conclusion that it was agreed to——

Mr. Moore. I made no objection to its going out.

Q. Mr. Soule, you kept one copy of that, did you?

A. Yes, this was to be the basis of the contract.

Q. Mr. Dowling took the other?

A. That is correct.

Q. He drew up the contract?

A. Yes, sir.

Q. You signed that contract when?

A. January 6th.

Q. Was it your understanding at the time you signed that contract that you were to put up the framework, or that Soule was to put it up, or that the Union Paving Company were to put it up?

Mr. Wrigley. It calls for an opinion and conclusion when you ask for his understanding.

Mr. Moore. I think it is proper to show his understanding as to what the contract meant at that time, your Honor.

The Court. I will allow it.

A. I distinctly understood, and it was so stipulated on this written form, that they were to furnish it, and we reduced the price from \$28.60 by deducting the amount to \$24.80 and horse trading to \$22.50." (Tr. pp. 380, 381, 382, 383, 384, 385, 386, 387.)

Soule's copy of the letter of December 11th was admitted in evidence. (Ex. 23, 388, 390.) Dowling's copy of the letter (Ex. 21, 324-326) is printed at pages 39 to 41 of appellants' brief. Later when we comment on these two letters as showing a complete and full meeting of the minds and understanding, we will insert photographic copies of these two letters. It is sufficient at this point to note that in paragraph seven of this letter, in Soule's handwriting is the provision "you are to furnish wood supporting framework". On cross-examination Soule's attention was drawn to the fact that the written contract prepared by Dowling and signed on January 6, 1940 did not contain this provision.

"Q. And there is totally omitted from this contract your wording as to the wooden framework; that is all omitted from here, isn't it?

A. Oh, it did go on to say that you shall make ready those piers, and that is the part that I construed as to the furnishing of this falsework. When you make this ready and have done these things which you have agreed to on here and have built this there, it is then made ready to receive the reinforcement bars, so that the two are synonymous in my understanding.” (Tr. p. 402.)

This testimony amply supports the trial court’s finding heretofore quoted, that the clause of the contract requiring the paving company to make the sections of the piers and abutments ready for placement meant that they were to erect the interior framework and permit Soule to use it without cost.

(2) TESTIMONY OF STEVENS (469-476), COCHRANE (476-482).

We do not consider it necessary to detail the testimony of these two witnesses, but consider it sufficient to say that they fully corroborate Soule, particularly in regard to the conference of December 29, 1939.

(3) TESTIMONY OF DOWLING.

Dowling’s deposition was taken prior to the trial. At the time of the court’s ruling—Dowling was on the witness stand, but Soule, Stevens and Cochrane had not as yet testified.

Dowling admitted that a meeting took place in the drafting room at which Soule, Stevens and Cochrane were present, but places the date of the meeting approximately a month and a half prior to December

29, namely, on November 17 or 18. (323.) He likewise admits that at the meeting a sketch of the interior framework was made, but states it was made by a Mr. Gorman and not by Soule, and denies that Exhibit 22 was used. (320-321.) He denies that any of the terms of the proposed contract were discussed. (320-321.) He thus corroborates Soule, Stevens and Cochrane to the extent that a sketch of the interior framework was made, but otherwise he denies in toto their testimony. He stated that he received a copy of the letter of December 11, 1939 about the date which it bears (322) but says the pencil memorandum was not on it at the time of its receipt, and was not put on in the presence of either Cochrane or Stevens, but was inserted by Soule when Soule came to his office on January 6, 1940 at the time of the closing of the contract. He says the interlineations were written in after the closing of the contract (323), but he then reverses himself and says they were made prior to the making of the contract. (327.) According to Dowling the contract was drawn before he got the letter (327), but he then says the interlineations were put on the letter before the contract was signed. (328.) A reading of Dowling's testimony (320-329) shows it was impossible to get a direct answer out of him. The interrogator was met with evasion or argument.

After listening to Soule, Stevens and Cochrane's testimony Dowling returned to the witness stand and changed his previous testimony. He says that he did not receive the letter on December 11th, but that

Soule came to his office on January 6th with the letter and that the interlineations were put on at that time. (512-513.) His deposition was then opened (514) wherein he testified that Soule had brought in this letter on December 11th and the interlineations were made at that time, and were discussed between him and Soule. (516-7.) We thus have three versions from Dowling; first, that the letter was received by him on December 11th and the interlineations made on January 6th; next, that the letter was received on January 6th and the interlineations made on the same date; and, finally, by deposition, the letter was received on December 11th and the interlineations made on that date. In his deposition he testified that all of the provisions of the letter were discussed, admitting that the clause "you are to furnish wood supporting framework" was written into the letter after discussion between himself and Soule and after it had been agreed to by himself. (518.) On the witness stand he asked to be relieved of his previous testimony and asked the privilege of changing it to the effect that the letter was not delivered on December 11th but delivered on January 6th (516), yet he affirmed that the clause relative to the interior framework was discussed, stating that the testimony given in his deposition was true. (519.) Furthermore Dowling testified that in drafting the contract he used the government specifications alone (329), yet a comparison of the clauses of the contract and the provisions of the letter show that many of the provisions of the letter were copied verbatim into the

contract (516-519), thereby demonstrating that the letter was used as one of the basis of the contract.

No coherent account can be obtained from Dowling as to what actually occurred prior to and at the time of the signing of the contract. Nowhere in his testimony does it appear between whom, nor where, nor when the minds of the parties met. We do not find out how the price of \$22.50 a ton was decided on, nor how other vital understandings were reached. The comparison of the clauses of the formal contract with the clauses in the letter conclusively show that the interlined letter was used as one of the basis on the contract, yet we search in vain through Dowling's testimony for any clear and concise statement as to when or under what circumstances he received his copy of the letter, or under what circumstances the interlineations were placed thereon by Soule. His contradictions and evasion on this crucial subject are significant.

D.

ARGUMENT.

For the purpose of illustrating that both letters are identical both as to the typewriting and as to the pencil interlineations, we are attaching in addenda photographic copies of Ex. 21 produced by Dowling, and Ex. 23 produced by Soule, in both of which there appears in Soule's handwriting "you are to furnish wood supporting framework". If the interlineations found in these letters were made under the circum-

stances related by Soule (corroborated by Stevens and Cochrane) and Dowling's copy was delivered to him for the purpose of drawing the contract, the case which is presented is so strong that if the final contract was contrary to these express understandings of the parties as conclusively evidenced by these letters, then a court of equity would be compelled to revise the contract. Judge Roche's findings, not only because of the conflict of the evidence rule, but because of the type and character of testimony, should not be disturbed. Dowling drew the contract, placed a provision therein which he knew Soule would believe expressed the oral understanding of the parties, performed in accordance with Soule's understanding in that the paving company made no objections to and paid Soule's monthly billings, made no demands upon Soule, until the job was about half completed, when the time was ripe to force Soule, by withholding progress payments, to assume (contrary to the contract) a portion of the paving company's obligations.

The rule relating to the admission of extraneous facts to assist in the construction of a contract is universal. We will therefore confine ourselves to the text of 17 C.J.S., pages 744 to 750.

“In arriving at the intention of the parties, where the language of a contract is susceptible of more than one construction, it may and should be construed in the light of the circumstances surrounding them at the time it is made, it being the right and duty of the court to place itself as nearly as may be in the situation of the par-

ties at the time so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and the correct application of the language of the contract. For this purpose in construing a contract the court will consider the nature of the agreement itself, together with all the facts and circumstances leading up to and attending its execution, the relation and condition of the parties, the nature and situation of the subject matter, and the apparent purpose of making the contract. The contract, or particular parts thereof, must be so construed as to harmonize with, and give effect to, such purpose, if possible. This rule does not apply, however, where the language of the contract leaves no doubt as to the meaning of the parties and in such a case the contract is to be construed without regard to extraneous facts."

* * * * *

"Where preliminary negotiations are consummated by a written agreement, or an oral contract is evidenced by a subsequent agreed memorandum in writing, the writing supersedes all previous understandings, and the intent of the parties must be ascertained therefrom. *In case of doubt as to its meaning, however, all the negotiations between the parties ought to be considered in giving a contract a construction.* Also, a final contract and a proposal may be construed together where they refer to and supplement each other, especially where the parties admit that the contract substantially conforms to the proposal; and in construing a written contract which superseded a prior written contract between the parties, the two contracts may be com-

pared in order to ascertain the situation of the parties when the second contract was made.”

California is in accord with the general rule, as shown by the text in 6 Cal. Jur. at pages 294-298, and particularly 297.

California cases which hold that evidence of preliminary negotiations are admissible are:

Balfour v. Fresno C. & I. Co., 109 Cal. 221;

Pearsall v. Henry, 153 Cal. 314 at 329;

Joy v. Rousseau, 72 Cal. App. 179;

Crawford v. France, 219 Cal. 439.

A late California case which also contains an excellent summary of the earlier cases relative to the rules of interpretation followed in California, and which particularly states that the construction given to a contract by the acts and conduct of the parties before any controversy has arisen, is entitled to great weight and will be adopted and enforced, is *Universal Sales Corp. v. Cal. etc. Mfg. Co.*, 20 Cal. (2d) 751.

Another late California case which bears a striking similarity on the facts—in that, the contractor rendered bills according to the understanding of the other party, then when the work was three-quarters finished, changed his billing and contended for a different interpretation, is *Johnstone v. Joint Highway Dist.*, 138 Cal. App. 450.

REPLY TO POINT TWO.

We do not understand appellants' argument (App. Br. p. 28) but apparently it has to do with the cost of installing certain spacers, stiffeners, and templates. Not only do no figures appear therein which can be identified as the cost of these spacers, stiffeners and templates, but due to the position which appellants maintained in the trial court, no figures could possibly be produced. By cross-complaint appellants claim that they had performed certain work which Soule was obligated to perform and that the cost of this work amounted to \$61,112.62. (Ex. Y.) The burden of proof was therefore upon the cross-complainant. No evidence was introduced as to what spacers, stiffeners, or templates the defendant installed, appellants taking the position, at the conclusion of the case (523-524), that the burden of proof laid upon the steel company. The trial judge asked defendant's counsel what they claimed the cost of the spacers, stiffeners and templates were which they claimed to have installed. Counsel replied that it had never been shown, after which the court asked counsel if they had not produced the evidence how did they expect him to determine it, to which the reply was made that the burden was on the plaintiff. Undoubtedly defendant was wrong, but even assuming that the burden of proof laid upon the plaintiff, nevertheless, it fulfilled this burden. Stevens, as stated by appellants (App. Br. 28) testified that the spacers, stiffeners and templates were used to support the steel, but what counsel

neglected to mention, is that, Stevens also testified (424) that the Soule Company installed these spacers, stiffeners and templates and paid for them.

REPLY TO POINT THREE.

Appellants have devoted all of point three of their brief to the establishment of the proposition—that when Union notified the steel company that it was expected to pay a portion of the costs of the false-work and framework, that Soule should have rescinded the contract, gotten off the job and sued Union for damages, yet they say

“or (2) It might have proceeded with the contract and advised the Union Co. it intended to complete the contract, *reserving its right to claim damages on the completion of the contract*”.

Nowhere else in their brief is there to be found any explanation of what is meant by the foregoing statement. Actually Soule did proceed with the contract and is now suing for damages, in the sense, that after completing performance he is suing for the contract price. Frankly, we cannot decipher or understand appellants' argument, for if they admit that Soule had two options as to his future course of conduct, and that he exercised one of them, what bearing on the problem does the fact that he did not exercise the alternative option have, or in what way does it effect the present cause of action? However, in order to expose the fallacy of appellants' reasoning

it is necessary to review their arguments and the authority cited relative to the question of rescission.

When Union breached its contract by refusing to make the monthly payments then unquestionably Soule had the right to quit the job, treat the non-payment by Union as a rescission of the contract and sue in *quantum meruit* for a reasonable value of the services rendered. If the steel company had pursued this course of conduct it would have had to rescind promptly and the rule of law referred to in the California Civil Code and in the California cases cited at App. Br. page 31 would have been applicable, but Soule did not pursue this course, but stayed on the job, continued to perform the contract in the manner in which he understood it by placing the required amount of reinforcing steel. Since the steel company did not rescind the contract the authorities cited relative to prompt rescission have no bearing.

Although the paving company admits as previously stated that the steel company might have proceeded with the contract, reserving its rights to claim damages on the completion of the contract, yet, nevertheless it apparently reverses itself and takes the position that the steel company did not have this option but had to quit the job and rescind the contract whether it wanted to or not.

If a contractor quits the job, and if for any reason he is not justified in so doing he lays himself liable to heavy damages. The Six Companies pursued this course in the case cited by the defendants. (*Six Companies v. Joint Highway District No. 13*, 110 Fed.

(2d) 620.) In that case, due to many difficulties such as swelling ground and cave-ins the Six Companies was greatly delayed and was granted various extensions of time, but finally the District deducted from an installment payment some \$3500.00 claimed by the District as liquidated damages for delay at the rate of \$500.00 per day. The Six Companies thereupon quit, immediately rescinding the contract on three grounds: (a) That the retention of the liquidated damages by the District was a material breach of the contract, (b) that the District had misrepresented the nature of the ground through which the tunnels were to be driven, and (c) that the District had rescinded the contract by refusing to perform the laying out of certain lines and grades. At the time that the Six Companies quit it was some twenty days behind in the work. The trial court, affirmed by the Circuit Court of Appeal, held—that under the terms of the contract the Six Companies was not justified in quitting, and therefore allowed the District on its cross-complaint \$142,000.00 as liquidated damages for the delay of two hundred and eighty-four days, of which, as will be noted, two hundred and sixty-four days occurred after the Six Companies had quit; \$69,001.85 covering interim expenses paid by the District in protecting and insuring the work and advertising for new bids; and \$98,066.31 representing the completion costs in excess of the Six Companies' bid; or total damages in excess of \$309,000.00.

Soule Steel Company faced identically the same situation which the Six Companies faced. The Master

Contract carried a provision for heavy liquidated damages for delay. Soule Steel Company's quitting would undoubtedly have caused a serious delay in the progress of the work, because the Union Paving Co. would have either to have secured equipment and organized a crew to take over the placing of the reinforcing steel, or would have had to secure a new sub-contractor. This would have taken time, and the same as in the Six Companies case, interim expenses would probably have been incurred by the Union Paving Co. in protecting and insuring the work and advertising for new bids. Also completion costs in excess of the contract price might have accrued. The defendants now say that this was the only course open to the Soule Steel Company; in other words, they say that because the Union Paving Co. breached its contract that such breach automatically forced the Soule Steel Company to rescind and that they could not continue to comply with and perform their contract to its completion and recover the contract price.

Neither of the other two Federal cases cited support the defendants' contentions.

In *Wenzel & Henoch Const. Co. v. Metropolitan Water District*, 115 Fed. (2d) 25, the construction company entered into a contract with the District to construct a tunnel. Due to swelling ground and other reasons the construction company was far behind the schedule of completion, and the District, under a provision of the contract, took over a portion of the job. The construction company tried to pre-

vent the District from taking over, and even brought a suit for specific performance of the contract to require that possession of the tunnel be restored to it. This suit was dismissed. The construction company subsequently brought another action on three counts: (a) damages for breach of express contract, (b) *quantum meruit* for value of materials furnished and work done independent of the express contract, and (c) money had and received. In regard to the count on the contract, the Circuit Court held that under the terms of the contract the District had the right to take over the job and therefore its taking over did not breach the contract so as to create a cause of action in favor of the construction company. On the question of the recovery under *quantum meruit*, the court held that although under the California law a contractor has the right to rescind upon the non-payment of an installment and sue on *quantum meruit*, that the rescission must be made promptly, and that not only did the construction company not elect to rescind, but actually had brought an action for specific performance of the contract. It will be noted that this case is the reverse of the present case in that the court held that the construction company had breached the terms of the contract and that therefore the District was justified in taking over the work; while here the breach was on the part of the employer and not on the part of the contractor. This decision does not hold nor purport to hold that a contractor's sole remedy is to rescind and sue for damages.

The case of the *City and County of San Francisco v. Transbay Construction Company*, 134 Fed. (2d)

468, is strong authority against the defendants and in our favor. In that case the contract was for the elevation of the O'Shaughnessy Dam, and the contract provided for excavation which was estimated at 30,000 cubic yards at \$2.75 per yard. It ultimately developed that 84,000 cubic yards had to be removed. The performance of the contract was delayed for approximately one year due to the increased amount of excavation, and also to the vacillating behavior of the city engineers. The contractor was paid for the increased yardage at the contract price of \$2.75 per yard, but claimed that it had suffered damages by reason of the delay caused by the city in that it had to expend some \$386,000.00 in extra costs in the maintenance of its plant and equipment and in such items as interest, insurance, overhead, maintenance of roads, etc. The complaint contained three counts. The court states the first cause of action was predicated on the theory of breach of contract for the extra expense, whereas the second and third were predicated on a quasi or implied contract on the notion that the express contract had been abrogated or rescinded. The trial court denied judgment on the first count on the ground that no claim had been presented to the city within sixty days as required by the city charter, but felt the contract should be abrogated because of the delay. The Circuit Court of Appeals on the contrary held that a suit for *quantum meruit* only arises where a contract is rescinded, and states that the Transbay might have treated the contract as rescinded but that it did not do this, and also that it would have

had to rescind promptly which it did not do. The Circuit Court says:

“But we agree with Transbay that this was not the only course it might take without waiver of its rights. It might, we think, elect to proceed with the contract, advising the city of its election and reserving its right to claim damages for the unjustifiable delays suffered at the hands of the city.”

The court further continues:

“But having proceeded with the contract, Transbay was not thereafter at liberty to treat it as nonexistent and recover for the entire job on a cost plus basis.”

It will thus be observed that this case clearly recognizes that a contractor has an election of remedies where he claims that a breach has occurred upon the part of the employer, namely: He can either elect to rescind the contract and sue for the reasonable value of labor and materials, or proceed with the contract and reserve its right to claim damages. This view is borne out by many other authorities to which we will briefly refer.

We desire to call the court's attention that this is exactly what Soule Steel Company did, except that it makes no claim for damages, but asks that it be paid the contract price. The Soule Steel Company (as recognized by the Transbay case) elected to proceed with the contract regardless of whether or not the Union Paving Co. made the installment payments required of it under the contract, and at the comple-

tion of the contract and the acceptance of the work by the United States Government under the Master Contract, Soule Steel Company brought suit for the contract price. Nothing in any decision referred to by the appellants indicates in the slightest way that Soule did not have a perfect right to pursue the exact course which it did, and in fact, the Transbay case recognizes the propriety of pursuing such a course.

In effect, defendants argue—that if a contractor fails to make a progress payment that the only course of action which the subcontractor can pursue is to rescind the contract and quit the job. If this postulate is sound then the rescission automatically follows the non-payment, and it is the non-payment which creates the rescission and not the action or non-action by the subcontractor, which would mean—that a contractor could at any time cancel or terminate the agreement of the parties by simply failing to make a progress payment. That no such doctrine exists is easily demonstrated. In *Bank of America etc. Association v. Moore*, 18 Cal. App. (2d) 522, a lease contained a provision that if the lessee fails, neglects or refuses to pay the rent for a period of ten days, the lease “Shall thereupon become and be null and void” and all rights of the lessee “shall be forfeited and ended”. Under this express provision in the lease, the assignee of the lessee claimed that it gave him the option to drop the burden of the lease whenever he so desired. The court after a very lengthy citation of authorities unequivocally held that such provision was inserted for the benefit of the lessor, and the

failure to pay the rent does not void the lease except at the option of the lessor. The same reasoning must of necessity apply to construction contracts, in that although the law permits a subcontractor to rescind a contract upon the non-payment of a progress billing that this right of termination is for the benefit of the subcontractor which he may, at his option, avail himself of, but does not have to. The decisions bear this out. One of the leading cases in America is the California case of *McConnell v. Corona City Water Co.*, 149 Cal. 60, the language from which is quoted as the text in 6 *R. C. L.*, page 1032. In the *McConnell* case, the contractor agreed to construct a tunnel. Through the fault of the owner in furnishing defective timber and the mistake of the engineers as to the strength of the timber required, the tunnel caved in. The contractor regarded the contract as terminated. The court said:

“One who has been injured by a breach of contract has an election to pursue any of three remedies. He may treat the contract as rescinded and may recover upon a quantum meruit so far as he has performed; or he may keep the contract alive, for the benefit of both parties, being at all times ready and able to perform; or, third, he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing. In this last case the contract would be continued in force for that purpose. (7 *Am. & Eng. Ency. of Law*, 2d Ed., p.

152; *Fountain v. Semi-Tropic L. and W. Co.*, 99 Cal. 680 [34 Pac. 497].)”

McConnell v. Corona City Water Co., 149 Cal. 60, at 64-65.

The language of the court in the *McConnell* case is quoted verbatim as the authority for the decisions in the later California cases of *Sobelman v. Maier*, 203 Cal. 1; *O'Connell v. Federal Outfitting Co.*, 5 Cal. App. (2d) 327; *King Features etc. v. K.M.T.R. etc. Corp.*, 29 Cal. App. (2d) 247; and *Dyer Bros. G.W.I. Wks. v. Central I. Wks.*, 72 Cal. App. 202.

Many decisions in other states hold that one party to a contract by refusing to perform, cannot compel the other party to rescind it. We will refer to two of them.

“In *John A. Roebling's Sons' Co. v. Lock-Stitch Fence Co.*, 130 Ill. 660, 22 N.E. 518, it was said: ‘Where one party to a contract gives notice before the time of performance arrives that he does not intend to perform, the other party may treat such notice as a breach and bring his action, or he may decline to accept such notice as a breach, and may insist that the contract shall continue in force up to the time fixed for its final performance, holding the party refusing to perform responsible for the consequences of such refusal. One party to a contract cannot, by simply refusing to carry out his part of it, compel the other party to rescind it. The latter has a right to keep it alive notwithstanding such refusal.’”

“In *Indiana L. Endowment Co. v. Carnithan* (Ind.), 109 N. E. 851, the court said: ‘* * * The

authorities also emphasize the fact that one party to such a contract may not by himself rescind it, and that a repudiation by him alone, although absolute and sufficient to justify the other party in treating it as an anticipatory breach, does not necessitate such action by the latter party, but the latter party may elect to stand upon his contract and perform, or offer to perform, all the conditions thereof required of him, and then, when the day of performance arrives, proceed to enforce his contract.' ''

See also the decision in the *United States Press Association v. National Newspaper Association*, 227 Fed. 193, which is to the same effect, wherein a considerable number of authorities are quoted from.

CONCLUSION.

We therefore submit:

1. That the plaintiff is in error in its claim that the contract was unambiguous and that the trial court erred in admitting parol testimony of the preliminary negotiations.
2. That findings VIII and IX (pp. 51 to 56) relating to the interpretation of the contract are supported and justified by the evidence.
3. That appellants are not entitled to any credit for stiffeners, spacers or templates.
4. That the steel company was not compelled to quit the job and rescind the contract, but it could and

did in good faith continue the performance of the contract to its completion, and

5. That, therefore, it is entitled to an affirmation of the judgment.

Dated, San Francisco,
April 17, 1944.

Respectfully submitted,
THELEN & MARRIN,
COURTNEY L. MOORE,
Attorneys for Appellee.

(Appendix Follows.)

Appendix.



NO. 10
FOR THE NEW YORK OFFICE
FILLING

TELEPHONE
VALERIA 4161

U. S. DIST. CT. N. D. CAL.

NO. 2730112

FILED
X No. 21
14-15-43

WATER FILLING CASE

SOULÉ STEEL COMPANY
IRON AND STEEL PRODUCTS
BRIEN

1750 ARMY STREET, SAN FRANCISCO

December 11, 1939

PUFFS EXH. A

Traphagen

Gentlemen:

Re: Abutments and Piers, Pitt River Bridge Relocation of
Southern Pacific Railway and U. S. Highway 99

In regard to the labor of installing the reinforcing steel bars, Bid item No. 11, as specified for the construction of the above project in accordance with plans and specifications prepared by the United States Department of the Interior, Bureau of Reclamation, we are pleased to quote you as follows:

1. We are to receive the reinforcing steel bars f. o. b. cars Redding, California.
2. The 2" square bars are to be bent at supplier's mill, all other bars are to be furnished in straight lengths.
3. We are to be responsible for the unloading, checking and handling of said reinforcing steel upon arrival at Redding upon a lot to be provided by you. (We estimate the storage lot size should be about 150' x 350' and adjoining a rail track.)
4. We will do the cutting, bending and shaping of 2" bars preparatory to welding, loading on to trucks and transporting to jobsite to conform to your construction schedule.

5. You are to provide an easy and accessible roadway from the main highway to the base of the piers and abutments as required and a leveled portion around the piers, which may be for the purpose of unloading.

6. We will furnish all labor (including insurance) to do the placing of the reinforcing steel, including tie wire and accessories under above bid item No. 11 (but not including welding).

7. You will pour concrete "pyramids" in the base of piers #1, 2, 3, 4, 5, 6 and 7 (and/or will furnish and erect wood core forms and/or steel supports, against which the 2" bars can be supported.)

8. We have provided in this proposal for a jet engineer 16 months @ \$300.00 per month, which cost will be borne equally.

9. Sufficient lights will be furnished by you; also power outlets will be available for our use.

PRICE: As specified for the above items, the unit price of 24.00 per month.



If a bond is required, the same will be for your account.

PAIDMENTS are to be made on or about the 10th of the following month for 50% of the value of the work performed during the preceding calendar month, and the remaining 50% to be paid 30 days after completion of our portion of the work.

NOTE: We are not to be held responsible for failure by delay or default arising from strikes, lockouts or other contingencies beyond our control.

If the above is in accordance with your understanding, please accept in the lower left hand corner, and it will constitute an agreement between us.

Sincerely yours,

SOULE'S STEEL COMPANY

By Edw. L. Soule

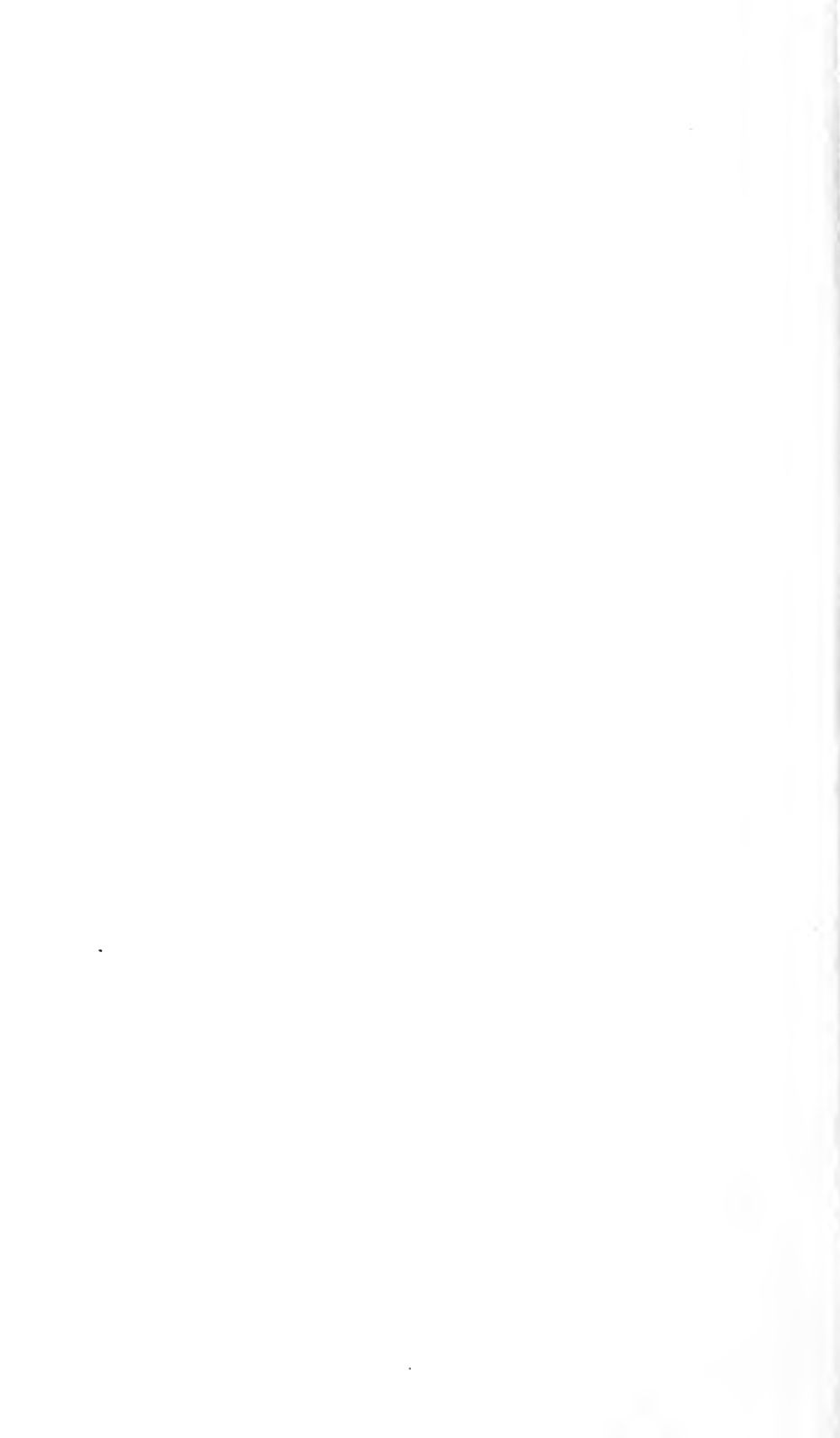
Accepted:

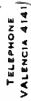
UNION PAVING COMPANY

By

① You are to provide materials as required, in the form of the plans to support the reinforcement. Steel reinforcement in the form of the plans. On the steel reinforcement, the steel reinforcement, with the reinforcement in the form of the plans. The reinforcement in the form of the plans.

ELSE





~~PRICE~~: As specified for the above items, the unit price of ~~each~~ per ton.



~~If a hand is required, the same will be for your account.~~

PAYMENTS are to be made on or about the 10th of the following month for 85% of the value of the work performed during the preceding calendar month, and the remaining 15% to be paid 30 days after completion of our portion of the work.

NOTE: We are not to be held responsible for failure by delay or default arising from strikes, lockouts or other contingencies beyond our control.

If the above is in accordance with your understanding, please accept in the lower left hand corner, and it will constitute an agreement between us.

Sincerely yours,

SOULE'S STEEL COMPANY

By

Edw. L. Soule

Accepted:

UNION PAVING COMPANY

By

(7) You are to form concrete
"fills" as required, in the true
of sp. piece to support the
existing steel masts in the
bottom of the piece. On the
steel reinforcing, masts, the
steel shores, which support
the 2" vertical beams, are to
be placed.

ELS:DL







Due service and receipt of a copy of the within is hereby admitted

this.....day of April, 1944.

.....

.....

Attorneys for Appellants.

No. 10,571

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNION PAVING Co. (a corporation), PACIFIC
INDEMNITY COMPANY (a corporation) and
MARYLAND CASUALTY COMPANY (a corpora-
tion),

Appellants,

vs.

UNITED STATES OF AMERICA, for use and benefit
of Soule Steel Company (a corporation),

Appellee.

APPELLANTS' REPLY BRIEF.

DION R. HOLM,

206 City Hall, San Francisco,

HENRY F. WRIGLEY,

1029 Monadnock Building, San Francisco,

Attorneys for Appellants.

FILED

JUN - 9 1941

PAUL P. O'BRIEN,
CLERK



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O'Connell v. Federal Outfitting Co., 5 Cal. App. (2d) 327, 42 P. (2d) 1070.	20
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No. 10,571

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNION PAVING Co. (a corporation), PACIFIC
INDEMNITY COMPANY (a corporation) and
MARYLAND CASUALTY COMPANY (a corpora-
tion),

Appellants,

vs.

UNITED STATES OF AMERICA, for use and benefit
of Soule Steel Company (a corporation),

Appellee.

APPELLANTS' REPLY BRIEF.

We will answer Appellee's arguments under the headings adopted by it.

A.

THERE IS NO CONFLICT IN APPELLANTS' CONTENTION AS TO THE MEANING OF THE CONTRACT.

Point One in our opening brief (p. 22) is devoted to establishing that the contract between the Department of Interior (Bureau of Reclamation) and Union Paving Co. merely required the Union Co. to place reinforcement bars where required under the contract, and the subcon-

tract between the parties specifically made it apply to the subcontract. We pointed out in our opening brief that paragraph 66 of the specifications (Ex. T., at p. 35) in part provided as follows:

“Reinforcement bars shall be accurately *placed and secured in position so that they will not be displaced during the placing of the concrete,*”

* * * * *

“the cost of furnishing and attaching wire ties and metal supports if used, of unloading, hauling, sorting, storing, cutting, bending, cleaning, *placing, and securing and maintaining in position all reinforcement bars.*”

and we quoted from paragraphs 23, 24, 45 and 66 of the subcontract. Paragraph 66 is similarly numbered in the original contract between Union Paving Co. and the Department of Interior.* Appellee states that we rely upon the doctrine of *expressio unius est exclusio alterius*, which is quite true and quotes the following excerpt from our opening brief:

“‘If it were not intended under the subcontract that the Soule Company was not to build the falsework and interior framework, there was no reason to state that where there were cores in the piers that Union Co. would undertake to build those, and which structures could then be used by Soule to support the reinforcement bars. If Union Co. were supposed to build all the falsework and interior framework, what would have been the purpose of incorporating the section of the contract last quoted?’ (App. Br. 27.)” (Soule B. 4.)†

*The subcontract may be found in the transcript from pages 13 to 18 inclusive, entitled “Memo of Agreement”.

†Appellee’s brief hereafter shall be referred to as Soule brief.

Appellee leaves the question above asked unanswered. Then it proceeds to quote from a part of the subcontract to the effect that the subcontractor will proceed with placing reinforcement bars in sections ready for such placement and claims the contract is ambiguous, as the terms "sections" and "ready for placement" are not defined in the contract.

The subcontract read in connection with the original contract can lead to but one conclusion, namely, that Union was to provide all necessary foundations on which the reinforcement bars were to be erected, as it is set out in Section 66 of the subcontract:

"The contractor at its own cost agrees to provide and pour necessary concrete sills in the base of all piers sufficient to support reinforcing steel mats."

and as sections of piers or abutments were prepared for the placement of steel, Union was to notify Soule to erect the reinforcement bars. Also, as the steel bars were welded for the next length of bars and the lifts of concrete poured, all this constituted "sections" and "ready for placement". No disputes arose about this language.

This portion of appellee's brief was apparently designed to distract the Court's attention from the fact that counsel for appellee failed to answer the question as to why there should have been inserted in the subcontract the provision that where cores were provided for in piers 3 and 4, the only structures requiring them, that Union Co. would build these timber forms. It seems to us apparent that omitting this provision in the rest of the contract it was the intention of the parties that Soule

should construct the falsework and interior framework on all other parts of the job that was necessary and essential and without which Soule could not have erected the reinforcement bars.

The portion of Finding VIII quoted by Appellee (Tr. p. 53) goes to the essence of this appeal as it seeks to interpret the contract, which interpretation this Court is in no way bound to accept, and is called upon under the authorities referred to in our opening brief (p. 46) to interpret it itself irrespective of what the District Court may have done, taking the contract as it is written from its "four corners".

Appellee has failed to answer the question asked in our opening brief and has merely re-stated our question.

B.

**NOTHING IN APPELLANTS' BRIEF OR IN THE EVIDENCE
JUSTIFIED TRIAL COURT IN HOLDING THE CON-
TRACT WAS UNCERTAIN.**

Under subdivision (a) of this part of appellee's brief is specified the way Union maintained its books of account, which is admitted, and the Court's attention was called generally to this fact: that on October 15, 1940, charges for the interior framework and falsework were set up by Union, allocating the costs thereof between the parties and after that date maintaining the books similarly until the job was completed.

It is to be noted that on July 29, 1940, there were only 1027 tons of reinforcing steel erected (Pl. Ex. 4, Tr.

p. 83), less than one-fifth of a total of 5533 tons. (Pl. Ex. 9, Tr. p. 89.) In the forepart of this month of July, 1940, Mr. Dowling endeavored, in the presence of Mr. Morisette (Tr. p. 445), to have Mr. Stevens agree as to the equitable setting up of the books prorating the cost of the falsework. Mr. Stevens denies this occurrence and claims it was not until October 15, 1940 that he definitely told Mr. Dowling, Soule would pay for none of the cost of the interior framework, and thereupon Union Paving Co. made its equitable charges on its books consistently with the terms of the contract.

(b) Appellee complains that Union did not consult it about the material purchased and the labor admittedly all paid for by Union and

“never made any demands of the steel company that they construct the framework”.

The record does not bear out this assertion. It is admitted that on October 15, 1940, Soule knew Union was charging it for these materials and labor and it was expected to pay its portion of the cost and as a matter of fact did on October 25, 1940, undertake part of the construction of the falsework. (Tr. pp. 436, 437.) Hence, the appellee's brief is inaccurate in this respect and when Soule refused to bear any portion of the cost of material and labor for the interior framework and falsework, it thereupon became useless to consult with it as to how purchases should be made or what prices should be paid.

(c) Appellee claims it rendered bills for six months to which Union did not object. These bills are found only in forms of estimates, Plaintiff's Exhibits 1 to 9 (Tr.

pp. 80 to 89) and Union did pay in accordance with them, up to September, 1940. (Tr. p. 303.) Thereafter Union did not pay Soule until the latter had caught up with steel placed as compared to the portion of the cost of falsework charged to Soule.

As an example, Plaintiff's Exhibit 1 (Tr. p. 80) shows in March, 1940 there were only 19½ tons installed; in April a total of 115; in May it reached 230 tons, and as of June 29 (Pl. Ex. 4, Tr. p. 83) there was only installed a total of 527 tons of the reinforcing steel, less than 10 per cent of the full 5533 tons of reinforcing bars to be placed.

It was in the month of July that Dowling first questioned Stevens as to how the cost of falsework should be charged.

This appears to us as due diligence on the part of Union's representative to endeavor to prorate its costs. It is to be noted that these estimates are referred to in the transcript and brief of appellee as bills.

On October 15, 1940, when Soule admits knowing of Union's intention of charging for the falsework, there still remained more than 50 per cent of the steel to be placed. Plaintiff's Exhibit 7 (Tr. p. 85) shows a total of 2000 tons of steel and Exhibit 8 (Tr. pp. 85, 86) shows that on October 31, 1940, only 2912 tons of reinforcement bars were in place. It is fair to assume that of the 2912 tons placed in October, half were so placed in the first fifteen days of that month.

(d) Appellee claims Union waited ten months after the contract was signed before a claim was made that Soule was to erect the framework.

On January 6, 1940, the contract was entered into. The work of placing steel began in March (Pl. Ex. 1, Tr. p. 80) and 19½ tons were placed in that month, and in July, 1940 the record shows that Mr. Dowling questioned Mr. Stevens, a partner of Soule, as to the method of charging the cost of the falsework.

“Q. Did you have any discussion with Mr. Stevens with reference to the interior framework or falsework on the piers?

A. I did.

Q. Approximately when did the first discussion come up?

A. Well, the first discussion came up along about in July.

Q. Of what year?

A. Of 1940, early in July. * * *

Q. Give us in substance what you said and what he said at that first conference with reference to the interior falsework or framework?

A. I asked him to sit down with us and adjust or come to some agreement of how the charges for the interior structure should be apportioned. He said he would take it up with San Francisco. Nothing happened until along about in September, again.” (Tr. pp. 277, 278.)

At this time, at the end of July (Pl. Ex. 5, Tr. p. 84) but 1027 tons of reinforcement bars were placed, less than a fifth of the total amount. Union had naturally assumed the terms of the contract meant what they said and it would only be charged with the framework about the cores, and Soule the balance. For appellee to claim ten months elapsed before the matter was discussed is mis-

leading to the Court. Morisette confirmed the discussion of July (Tr. p. 445), another was had in September (Tr. p. 277) and the admitted one of October.

An examination of our opening brief fails to disclose that we omitted all or any of the pertinent portions of evidence referred to in subdivisions (a), (b), (c) and (d) of appellee's brief.

(e) We admit no agreement was reached as to the payment of the falsework, and had Soule acted in accordance with his contract, and reasonably, this case would not be before this Court.

(f) It is a fact that on October 12, 1940, when it was apparent Soule would not state the basis on which the cost of the falsework should be proportioned, that the books from the preceding March, showing the sums chargeable to Union and chargeable to Soule for the cost of the falsework were adjusted in accordance with the facts as the books disclosed.

(g and h) These two subdivisions of appellee's brief are directed toward the method of allocating charges rather than to the right to make charges against Soule for the cost of the falsework. It might well be that this Court would take the view that Union did in some respects place too great a burden upon Soule for the cost of the falsework but if this is so this case should be returned to the District Court with instructions to it to determine what was fair. However, an inspection of the total costs, which appellee printed in its brief at pages 14 and 15, shows that Union Paving charged itself with \$56,803 and Soule with \$61,112 of the total cost of \$117,916. This

does not appear to us as arbitrary or unfair and appellee other than making the statement that it is arbitrary fails to show in what respect.

Appellee then has a subdivision of its brief numbered 2, to the effect that inconsistencies and contradictions appear in the opening brief caused by the testimony previously outlined. We are at a loss to find in this portion of the brief where counsel has illustrated even one inconsistency.

Appellee's argument seems to be directed to the fact that it was not charged for all of the cost of the falsework in all piers and abutments. Our brief is quoted to show that Soule was not charged for falsework or temporary supports on abutments 2, 3 and 4, or piers 8, 9 and 10 (Tr. pp. 286, 287, 302) and in the course of its brief endeavors to illustrate that Union charged itself with only $33\frac{1}{3}$ per cent of the cost of all the falsework and charged Soule with $66\frac{2}{3}$ per cent. Figures, we know, may be used peculiarly. The fact is, as shown on appellee's brief, pages 14 and 15, the total cost of the falsework was \$117,916, of which \$56,803, as we have stated before, was charged to Union and \$61,112 charged to Soule. One does not have to deal in mathematics to show that this is not an allocation on the basis of $33\frac{1}{3}$ per cent and $66\frac{2}{3}$. The figures speak for themselves.

Appellee asked by what right did Union charge the costs of the falsework if the parties were unable to reach an agreement up to October 15, 1940, in the proportions we have above indicated and in the proportions of $33\frac{1}{3}$ and $66\frac{2}{3}$ as appellee contends. It asks the further ques-

tion as to what provision in the contract provided for such a division and wherein did it appoint Union Paving Co. to be the arbiter of how the costs should be placed?

All these questions go back again to the reasonableness of the proration of the charges.

We have explained in our opening brief the reasons why for certain piers and abutments no charges were made against Soule. Briefly, it is that none of these tremendous structures, as shown in the pictures in our opening brief between pages 6 and 7 were required on the abutments and piers for which Soule was not charged.

We reiterate that Section 66 of the subcontract (Tr. p. 16) states that Union at its own cost agreed to pay the cost of an accessible roadway to the base of all piers and abutments and construct a wooden trestle over and about the base of all pier excavations and construct wooden cores as shown on the plans which may be used by the subcontractor as a supplementary support for reinforcement bars.

Unequivocally and without ambiguity the contract states what charges Union shall bear. All other charges for the cost of falsework could be charged 100 per cent against Soule, rather than slightly more than 50 per cent of the cost. So the contract is not silent, and by reference to the specifications between the Government and Union Paving (Df's. Ex. T) which are all made a part of the subcontract between the parties to this action, the drawings attached to these specifications show the different type of construction involved.

No charges were made against Soule for falsework on abutments 2, 3 and 4, or piers 8, 9 and 10. (Tr. pp. 286, 287, 302.) These were all smaller units and the bars were placed in position and rested on rock base or concrete curbs or sills and were self-supporting; they required no welding or falsework to support them; hence no charge for falsework in these structures were made against Soule.

As we stated in our opening brief at page 7, the reinforcement bars placed in abutment 1 and piers 1, 2, 3, 4, 5, 6 and 7 required reinforcement bars used in these piers about 2 inches square and in 60-foot lengths and weighing approximately 900 pounds for each length. They then required welding and falsework or interior framework to support them as they were all placed in a variable oblique or sloping position.

The contract states what Union will pay for in the way of falsework about the cores, leaving the rest of the falsework to be supplied by Soule.

We use the maxim employed by appellee, *expressio unius est exclusio alterius*.

C.

Appellee next goes on to discuss a disputed ruling and testimony introduced as a result of the ruling, and ends the first page of its Argument by stating

“the evidence objected to was so convincing that it would have justified the reformation of the contract”.

It is to be pointed out this is not a suit for reformation of contract. It may well be that Soule should have pursued this remedy. The action at bar is predicated on the contract between Soule and Union. There follows several pages of conversations and happenings, some occurring as early as October, 1939 and referred to a conference held in the hotel in Sacramento in Mr. Dowling's bedroom about midnight while Mr. Dowling was in bed, concerning bids. And then takes us to Los Angeles as to what was done in the Soule office at Los Angeles concerning their figuring of placing reinforcing bars. A so-called "going-in bid" of \$33.82 a ton is mentioned and how it was dropped to \$28.60, then to \$24.80, and finally to \$22.50 a ton without any explanation of the reasons for their different bids.

All this testimony of course was objected to. There is set out a series of talks held on December 29, 1940, so appellee states in its brief at page 23, but it means 1939, and these conversations were likewise objected to.

Reference is made to Plaintiff's Exhibit 22. This is supposed to be a sketch of the falsework appellee claims Union should pay for. An examination of this exhibit shows it to be a sketch of Pier 3 and has two short uprights 8" x 8"; no indication of 10 x 10 and the detail set out in appellee's brief (pp. 23 to 25), and a few lines in red that might indicate most anything or nothing. The drawing entitled "Pier 3, 214-D-2754", a part of the general contract, Defendants' Exhibit T, shows more detail than Exhibit 22, which does not show falsework.

The purpose apparently is to illustrate that Union agreed to a price of \$22.50 a ton without any cost of the

falsework to Soule, and a great deal of space is addressed to a letter dated December 11, 1939 from Soule to Union, all of which was objected to as varying the terms of a written contract entered into on January 6, 1940, subsequent to all of the happenings recounted and quoted in appellee's brief.

In our opening brief we have stated the reasons why the consideration of such testimony is not countenanced by the decisions of the Courts of California.

The contract of January 6, 1940 superseded all prior negotiations and was reduced to writing, admittedly read by Mr. Soule of the steel company, a man of wide business experience, and signed by him. That contract constituted the meeting of minds, and all other prior conversations and writings were disregarded.

Appellee reaches the extraordinary conclusion that the testimony quoted by it supported the trial Court's finding that Union Co. was to erect the interior framework and permit Soule to use it without cost. This finding and the conclusion reached by appellee cannot stand, in view of the record in this case.

Appellee (Brief 30) felt it unnecessary to detail the testimony of Alexander Cochrane, a witness called by appellee and who formerly was a superintendent for Union but was relieved of his employment when only 1000 tons out of 5500 tons of reinforcement bars had been placed, or less than one-fifth of this part of the sub-contract completed. Severance of Mr. Cochrane with the job occurred in July, 1940. We deem it highly necessary to briefly call attention to the testimony of Alexander

Cochrane, appellee's witness, who admitted that he, in behalf of Union, had a bid for the placing of the reinforcement bars *including the cost of falsework that totaled \$24 per ton*. This bid Cochrane had at the time Soule first submitted its bid at Sacramento, and the following is found in the transcript:

"Mr. Wrigley. Q. Mr. Cochrane, just before the recess, as I understood your testimony, you knew Mr. Dowling had consulted you with reference to the various bids he had received from various people for the reinforcing steel and other work up there?

A. Before the bids went in?

Q. Yes.

A. Yes, sir.

Q. No, before the bids went in and after the bids went in.

A. Yes, sir, all the time.

Q. And in particular, he showed you a bid from Sherwood S. Cross, didn't he?

A. I don't recollect of him showing me that bid, but I will say that before the bids were opened in Sacramento we got a bid around \$24 from someone around Los Angeles—might have been the same gentleman—but Mr. Dowling didn't know we had that bid, because I considered it way too low to put up that falsework, and he never knew we had that bid until he came back from Sacramento." (Tr. pp. 492, 493.)

There is no reason assigned why Union would disregard a bid for \$24 which included the cost of falsework and accept a bid for \$22.50, which it is claimed excluded the cost of all the falsework when this item totalled \$117,000.

Next appellee epitomizes from its standpoint Mr. Dowling's testimony, which testimony naturally is in conflict with the testimony of Soule and confirms the provisions in the subcontract of January 6, 1940. Stress is laid upon the fact that Dowling was confused as to when the letter of December 11 was presented to him. This of course illustrates Mr. Dowling's honesty, as after three and a half years it is only natural that he would not remember when the letter was presented to him, in view of the fact that a definite and unequivocal contract had been entered into at a later date, namely, the following January 6.

D.

ARGUMENT.

Appellee under this heading argues that the letters (Ex. 21 and 23) of December 11 was sufficient that "a court of equity would be compelled to revise the contract". This is not an action to revise the contract but one for damages predicated on the contract.

We do not challenge the text quoted from 17 C.J.S., pages 744 to 750, but adopt it and state that it is not applicable to this case, as the subcontract is susceptible of but one interpretation, namely, that Union was to pay for the falsework around the cores in the piers and Soule all other falsework charged to it. Hence there was no necessity for the District Court to have admitted extraneous evidence.

The cases cited by appellee have very apparent and latent ambiguity in the contracts under consideration, as in *Balfour v. Fresno C. & I. Co.*, 109 Cal. 221, 41 Pac. 876, the contract failed to state the time when payment was to be made for the uses of water and it was obviously ambiguous as to when the completion of a ditch for the diversion of the water was to have occurred. *Pearsall v. Henry*, 153 Cal. 314, 95 Pac. 154, was a case involving a written contract for the sale of real property based upon first a written agreement which written agreement was thereafter modified by an oral contract that in effect became a novation and the court properly held that the novation was not a modification of the written contract but a new contract and oral evidence of the oral contract was competent. The case of *Joy v. Rousseau*, 17 Cal. App. 179, 236 Pac. 979, involved three written contracts for the sale of a vineyard, assignments of the contracts and particularly what was meant as to "a prorating of interest * * * to be adjusted when interest is received." Obviously such ambiguous language required parol evidence to explain. In *Crawford v. France*, 219 Cal. 439, 27 P. (2d) 645, an architect sought to recover fees based on a contract that contemplated a building "suitable for the needs of the owner". Nothing was provided for in the contract as to what the cost of the building was to be or what was meant by the term needs of the owner. Under such an uncertainty on the face of the contract parol evidence was properly admitted.

Appellee next refers to *Universal Sales Corp. v. Cal. etc. Mfg. Co.*, 20 Cal. (2d) 751, 128 P. (2d) 665. This was an action for declaratory relief and interpretation

of a contract. It involved the purchase and use of machines that produced poultry and animal feed. Questions as to whether this involved contracts, included improvements on the machine, participation in patents obtained before or after the contract was entered into and the gross selling price of future sales from two classes of machines or presses. Cost of operations also entered into an interpretation of the contract. These provisions obviously require parol evidence, as from a reading of the contract the intent of the parties could not be determined.

The next case cited is *Johnstone v. Joint Highway Dist.*, 138 Cal. App. 450, 32 P. (2d) 681. This case would seem to be more in Union's favor than in Soule's as the Johnstone contract based payment on asphalt "in place", meaning just what the words implied and did not mean that the asphalt was to be computed on the amount of asphalt conveyed in wagons.

All of appellee's cases are clearly distinguishable from the existing case, as we again emphasize the Union-Soule contract is unambiguous. It clearly states Union will pay for the falsework around the cores erected in piers 3 and 4 and of course leave the erection of the rest of the job to Soule. The intention of the parties is contained in the written document and the consistent efforts on Dowling's part to have the cost of the falsework properly apportioned, coupled with his notification that Soule was to pay this cost, as early as July 1940, and the actions of Union in refusing to pay moneys claimed due by Soule, for the falsework during the execution of the con-

tract, all tend to the interpretation of this document as contended by appellants.

Next in its brief appellee has a caption:

REPLY TO POINT TWO.

This refers to our claim that L. E. Stevens, a partner of Soule, testified (Tr. p. 423) that spacers used in the falsework and stiffeners had no use in pouring concrete. This included lumber, bolts, nails and other materials. The cost of all these was included within the cost of the falsework and Union at the time of trial naturally was unable to segregate them. They, however, admittedly remain an obligation of Soule's.

In its next point of the brief entitled:

REPLY TO POINT THREE.

Appellee says it cannot decipher or understand appellants' argument under Point Three of our brief yet thereafter proceeds to make an answer to it. To restate our position, it may briefly be said, as we stated in our opening brief, the two remedies for appellee, apart from seeking to have the contract reformed were: (1) That it might have treated the contract as rescinded and ceased work thereunder and sued for the value of labor and materials furnished to the date of the alleged breach justifying the rescission, or (2) It might have proceeded with the contract and advised the Union Co. it intended to complete the contract, reserving its right to claim damages on the completion of the contract.

Appellee glosses over the first part of our subdivision 2 of remedies in which we say it might have proceeded

with the contract *and advised* the Union Co. of its intention to do so and then claim damages. Nowhere in the record is there any evidence whatsoever of Soule advising Union of its intention to seek damages either in July, September or on or after October 15, 1940 when it knew it was to be charged and was being charged with the falsework. Soule even accepted two payments after October 1940, one on January 18, 1941 (Tr. p. 95) and the other as late as December 31, 1941. (Tr. p. 59.) The former in the sum of \$20,000, and the latter for \$16,000 in accordance with Union's interpretation of the contract. Not having advised Union of its intention to do so, it was placed in the position that it had to rescind the contract. The only billing that Soule made or gave Union or statements rendered were those contained in Plaintiff's Exhibits 1 to 16 inclusive (Tr. pp. 80 to 88) entitled "Estimate". An interpretation of these shows conclusively it was only a statement of the actual tons of reinforcement bars placed, charged at the bid price. No other notice. Cases cited by appellee indicate a notice of some kind is required as appears from the following.

In *McConnell v. Corona City Water Co.*, 149 Cal. 60, 85 P. 929, where defendant was supposed to furnish proper lumber for the plaintiff to construct a tunnel, the tunnel caved by reason of poor timber furnished by defendant and who after the cave-in refused to supply other timber or pay for the cost of the extra damages, the plaintiff properly recovered. It is to be noted in that case at page 63 "That the contractor complained of the inferior quality of the timber which defendant persisted in delivering to him, and of the inadequacy of the timber work which the engineers directed should be done, all without avail; * * *."

Nothing in the way of complaint to Union during the course of the Soule contract was made by reason of the falsework being charged against it or for failure to pay installments that would have been due if the falsework had not been charged for as it was. In fact Soule accepted two payments after the contract had been completed.

In *Sobelman v. Maier*, 203 Cal. 1, 262 P. 1087, we find at page 8 of that decision that not only one written demand was served on defendants for past breaches of contract but that a second writing was likewise served in which plaintiffs advised defendants of their failure to fulfill the contract and plaintiffs had elected to hold defendants responsible.

In *O'Connell v. Federal Outfitting Co.*, 5 Cal. App. (2d) 327, 42 P. (2d) 1070, it was found at page 329:

“On December 31, 1931, plaintiff terminated the contract and brought this action.”

The next case cited by appellee is *King Features v. KMTR*, 29 Cal. App. (2d) 247, 84 P. (2d) 322. We find on page 249 “That on or about the 13th day of April, 1937, defendants advised plaintiff that they for some time prior thereto had not been using the wire service and news reports furnished to them under said contract, and did not intend to use” them. And we find that plaintiff in that action refused to accept (p. 250) final payments offered in full settlement.

And in the final California case cited on this point, of *Dyer Bros. v. Central Iron Wks.*, 72 Cal. App. 202, 237 P. 386, it is found at page 206:

“and on September 12, 1916, the third appellant, served notice on the respondents that they respectively

withdrew from the contract and would not thereafter be bound by any of the terms of said contract.’’

This last cited case seems to be in favor of our contention, if it is applicable at all.

The three remaining cases of *Roebling Sons Co. v. Lock-Stitch Fence Co.*, 130 Ill. 660, *Indiana L. E. Co. v. Carnithan*, 109 N. E. 851, and *United Press Assn. v. Nat'l Newspaper Assn.*, 227 Fed. 193 (Colorado), need not be discussed as they are from jurisdictions other than California. The decisions of this and the California Courts prevail.

The cases of *Wenzel & Henoch Const. Co. v. Metropolitan Water Dist.*, 115 F. (2d) 25, and *Transbay Const. Co. v. City and County of S. F.*, 134 F. (2d) 468, clearly state what the law of California is on the doctrine of rescission. These cases coupled with those cited in our opening brief lead to the conclusion it was incumbent upon Soule to have rescinded its contract or, if it desired to continue the contract as written and understood by Union, to advise the latter Soule had a different interpretation of the contract and intended to enforce this unfair and erroneous view. To our authorities cited in our opening brief, sustaining the proposition that a written contract supersedes all oral arrangements, is the case decided, after our brief was prepared, of *Bradford v. Southern California Pet. Co.*, 62 A.C.A. 538, 145 P. (2d) 36, hearing in Supreme Court denied.

We urge and conclude that the judgment of the District Court should be reversed as

1. The contract is unambiguous.

2. Charges admittedly Soule's were not credited to Union.

3. Soule should have rescinded the contract or given notice it expected payment in accord with its interpretation either in July, 1940, or at the latest the following October when it admitted knowledge of being charged for the falsework.

4. Extraneous evidence should not have been admitted to alter the terms of the written contract especially conversations occurring $3\frac{1}{2}$ years before they were testified to.

5. If the charges for falsework were arbitrarily or unfairly made between the parties, the District Court should be instructed to ascertain what was a fair apportionment of these charges.

Dated, San Francisco,

June 9, 1944.

Respectfully submitted,

DION R. HOLM,

HENRY F. WRIGLEY,

Attorneys for Appellants.

